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Why Worry About Professionalism?

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1. Ethics vs. Professionalism – An Overview

There has been a rampant rise in regard for the concept of “professionalism.”

There has been reams of paper in journals and law reviews devoted to discussing and parsing the distinctions “ethics” and “professionalism. The discussion has not been confined to Louisiana courts¹ and to bar associations.²

¹ The Louisiana Code of Professionalism was incorporated into the Louisiana District Court Rules, Rule 6.2. Rule 6.3 is the “Code of Professionalism in the Courts.”

Louisiana Supreme Court Rule XXX(3), concerning mandatory continuing legal education, discusses the difference between ethics and professionalism:

“Legal ethics concerns the standard of professional conduct and responsibility required of a lawyer. It includes courses on professional responsibility and malpractice. It does not include such topics as attorneys’ fees, client development, law office economics, and practice systems, except to the extent that professional responsibility is discussed in connection with these topics.

Professionalism concerns the knowledge and skill of the law faithfully employed in the service of client and public good, and entails what is more broadly expected of attorneys. It includes courses on the duties of attorneys to the judicial system, courts, public, clients, and other attorneys; attorney competency; and pro bono obligations.

Legal ethics sets forth the standards of conduct required of a lawyer; professionalism includes what is more broadly expected. The professionalism CLE requirement is distinct from, and in addition to, the legal ethics CLE requirement.”

² The LSBA’s Code of Professionalism can be found at <http://www.lsba.org/2007/MemberServices/codeofprofessionalism.asp> and states, in full:

My word is my bond. I will never intentionally mislead the court or other counsel. I will not knowingly make statements of fact or law that are untrue.

* I will clearly identify for other counsel changes I have made in documents submitted to me.

* I will conduct myself with dignity, civility, courtesy and a sense of fair play.

* I will not abuse or misuse the law, its procedures or the participants in the judicial process.

* I will consult with other counsel whenever scheduling procedures are required and will be cooperative in scheduling discovery, hearings, the testimony of witnesses and in the handling of the entire course of any legal matter.

* I will not file or oppose pleadings, conduct discovery or utilize any course of conduct for the purpose of undue delay or harassment of any other counsel or party. I will allow counsel fair opportunity to respond and will grant reasonable requests for extensions of time.

* I will not engage in personal attacks on other counsel or the court. I will support

Across the nation, there are non-binding “codes of conduct” or “codes of civility” or “lawyer’s creeds” or “codes of professionalism.” This mushrooming mound of aspirational goals, ubiquitous promises of mannered behavior, and grand phrases indicate that the legal profession deems itself to be in a crisis. There are a plethora of publications professing the palliative of professionalism as a panacea for the perils of practice.³

What is the nature of the apparent crisis that has caused the rise in “professionalism” concerns and why does it require the reaction that has been engendered?

A basic problem is in the use of the term “professionalism.” No standard definition of “professionalism” is available. Writers of periodi-

my profession’s efforts to enforce its disciplinary rules and will not make unfounded allegations of unethical conduct about other counsel.

- * I will not use the threat of sanctions as a litigation tactic.

- * I will cooperate with counsel and the court to reduce the cost of litigation and will readily stipulate to all matters not in dispute.

- * I will be punctual in my communication with clients, other counsel and the court, and in honoring scheduled appearances.

³ The reader will note a definite tilt towards alliteration in this paragraph. As Justice Cardoza noted, in discussing legal opinions (but using a concept applicable to all effective writing): “The opinion will need persuasive force, or the impressive virtue of sincerity and fire, or the mnemonic power of alliteration and antithesis, or the terseness and tang of the proverb and the maxim.” P.H. Dunn, “How Judges Overrule: Speech Act Theory And The Doctrine Of Stare Decisis,” 113 Yale L.J. 493 (2003), citing Benjamin N. Cardozo, *Law and Literature and Other Essays and Addresses* 9 (1931).

For essays and articles on professionalism, in addition to those noted in the next footnote, see:

Durham, “Promoting The Standards Of Professionalism And Civility,” 19 Utah B.J. 8 (2006); McMahon, “Declining Professionalism In Court: A Comparative Look At The English Barrister,” 19 Geo. J. Legal Ethics 845 (2006); Corn, “Lessons From The Law Of War: A New Perspective On The “Legal Warrior’s” Code Of Professionalism,” 47 S. Tex. L. Rev. 781 (2006); Kennedy, Lantin & York, “Professionalism: Dealing With Unprofessional Conduct In Bankruptcy,” 36 U. Mem. L. Rev. 575 (2006); Schofield, “Practice & Professionalism Tips From A Mediator, Arbitrator And Appraiser,” 1 Trial Advoc. Quarterly (2006); Gunnarson, “Professionalism: Judges’ Pet Peeves,” 94 Ill. B.J. 20 (2006); Alvarado, “A Radical Proposal For Lifetime Professionalism,” 37 St. Mary’s L.J. 1053 (2006); Johnson, “Applying The Standards Of Professionalism And Civility To The Practice Of Criminal Law,” 18 DEC Utah B.J. 28 (2005); Rhode, “Profits and Professionalism,” 33 Fordham Urb. L.J. 49 (2005); Uelmen, “The Evils Of “Elasticity”: Reflections On The Rhetoric Of Professionalism And The Part Time Paradox In Large Firm Practice,” 33 Fordham Urb. L.J. 81 (2005); Creamer, “Professionalism: The Next Level,” 79 Tul. L. Rev. 1539 (2005); Ames, “Concerns About The Lack Of Professionalism: Root Causes Rather Than Symptoms Must Be Addressed,” 28 Am. J. Trial Advoc. 531 (2005); and Barton, “The ABA, The Rules, And Professionalism: The Mechanics Of Self Defeat And A Call For A Return To The Ethical, Moral, And Practical Approach Of The Canons,” 83 N.C. L. Rev. 411(2005).

cal and law review articles cannot agree on any particular and limited definition;⁴ the reaction is more akin to the famous statement of Justice Potter Stewart, who, in speaking of pornography, said “I know it when I see it.”⁵

On the one hand, there are those who argue that the entire concept of professionalism is illusive and self-defeating, a tacit admission that the Bar either cannot or should not make its members abide by any standards more stringent than that imposed by statutes and the Rules of Professional Conduct.⁶ Contrast these views to those who advocate that professionalism can and should be taught, that professionalism is what you ought to do while ethics are what you are required to do.

Should there be a tension between “ethics” and “professionalism”? Are the two different concepts or part of a single continuum? This paper explores these issues.

2. Professionalism Lauded by Courts

It is not as if acts of professionalism go unnoticed by the courts. Justice Souter has written that “the right against ineffective assistance of counsel has as much to do with public confidence in the professionalism of lawyers as with the results of legal proceedings.”⁷

There are numerous cases where courts have praised counsel for acts of professionalism. These include:

- A case involving complex issues and over 200 petitions for review of FERC orders:

⁴ Rizzardi, “Defining Professionalism: I Know It When I See It?” 79 Fl. B.J. 38 (2005); Ciolini, “Redefining Professionalism as Seeking,” 49 Loyola L. Rev. 229 (2003); -Ravenal, “The Contagion of Example: Attacking the Root of the Problem in Lawyer Professionalism 31 Federal Lawyer (2002); Bien, “A New Way for Courts to Promote Professionalism,” 86 Judicature 132 (2002); Coleman, “Professionalism Within the Profession,” 65 Tex. B.J. 926 (2002); Sturman, “Professionalism: We Know it When We See It,” 6 Nevada Lawyer (2002); Bronson, “Professionalism is a Choice,” 23 Montana Lawyer (2002); Vincent, “Aspirational Morality: the Ideals of Professionalism, April Utah B.J. 24 (2002); Harris, “The Professionalism Crisis--the ‘Z’ Words And Other Rambo Tactics: The Conference of Chief Justices’ Solution,” 53 S.C. L. Rev. 549 (2002); Spivey, “Ethics: Lawyering and Professionalism,” 33 St. Mary’s L.J. 721 (2002); Harris, “The Professionalism Crisis,” 3 Prof. Lawyer 1 (2001); Morgan, “Real World Pressures on Professionalism,” 23 U. Ark. Little Rock L. Rev. 409 (2001); Berry, “Civility and Professionalism,” Nevada Lawyer (Nov. 2002).

⁵ *Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S.Ct. 1676, 1683, 12 L.Ed.2d 793 (1964) (concurring opinion).

⁶ See, e.g., Wittmann, “Should ‘Professionalism’ Be Mandatory? Can Civility Be Taught?”, 45 La. B. Journal 19 (1997); Alston, “The Ten Commandments of Professionalism: a Misguided Effort,” 4 Prof. Lawyer 24 (2002); Morgan, “What Needs Fixing? Toward Abandoning Organized Professionalism, 30 Hofstra L. Rev. 947 (2002); and Wangen, “Professionalism and Other Myths,” March Oregon St. Bar Bulletin 78 (1999).

⁷ *Mickens v. Taylor*, 535 U.S. 162, 207 (2001), Justice Souter, dissenting.

“We also express our appreciation to the parties and their attorneys for their cooperation, professionalism, and the quality of their presentations.”⁸

- A hotly contested case where the lawyers were able to enter into stipulations:

“In an admirable display of their attorneys' professionalism, the parties submitted their remaining disputes to the district court upon stipulated facts.”⁹

- A difficult matter that could have degenerated had it not been for the skill of the lawyers:

“We commend both attorneys in this difficult case for their professionalism. They skillfully litigated the contentious issues and zealously represented their clients without sacrificing civility, a linchpin of our legal system.... We applaud their devotion to the highest standards of the law.”¹⁰

- A matter on an expedited schedule:

Although the parties were under significant time pressure, both parties supplied thorough and thoughtful briefs and made excellent oral presentations. The panel expresses its appreciation to counsel for their professionalism.¹¹

- Praise of the government in a criminal case:

“In its brief, the Government states it does not oppose resentencing in this case. We commend the United States Attorney's Office for its candor and professionalism.”¹²

- And even praise in the politically-charged Terri Schiavo case:

“Finally, the court would be remiss if it did not once again convey its appreciation for the difficulties and heartbreak the parties have endured throughout this lengthy process. The civility with which this delicate matter has been presented by counsel is a credit to their professionalism and dedication to their respective clients, and Terri.”¹³

⁸ *Public Utilities Com'n of State of Cal. v. F.E.R.C.*, 462 F.3d 1027, 1034, (9th Cir. 2006).

⁹ *Hofer v. Unum Life Ins. Co. Of America*, 441 F.3d 872 (10th Cir. 2006).

¹⁰ *Wilson v. Airtherm Products, Inc.*, 436 F.3d 906, 912 (8th Cir. 2006, cert. den. 127 S.Ct. 182, (2006).

¹¹ *Beardslee v. Brown*, 393 F.3d 1032, 2035 (9th Cir. 2004), cert den 543 U.S. 1096, 125 S.Ct. 982, 160 L.Ed.2d 910 (2005).

¹² *U.S. v. Plotts*, 359 F.3d 247 (3rd Cir. 2004).

¹³ *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289, 1302 (11th Cir. 2005), rehearing en banc denied, 404 F.3d 1270 (11th Cir. 2005), rehearing denied, 404 F.3d 1282 (11th Cir. 2005), stay denied 544 U.S. 957, 125 S.Ct. 1722, 61 L.Ed.2d 541 (2005).

The question is, however, are the acts of professionalism that these courts acknowledge so profusely the norm, or are they rather extraordinary events?

3. A Lack of Professionalism Criticized by Courts

It appears that a lack of professionalism is something that is seen as being endemic. Justice O'Connor has said that, " 'in films, lawyers are depicted as unethical, as "bad professionals," and that "not too many Americans even remember that our society once actually trusted and respected lawyers.' She opined that "the decline of professionalism is partly responsible for this state of things."¹⁴

Courts continually bemoan the lack of professionalism that lawyers demonstrate, seeing fit to remonstrate counsel in their opinions. See, for example:

- Criticism of a lawyer's violation of the Louisiana Code of Professionalism:

"Plaintiff's original post-trial brief states that the attorneys for the defendant coached and rehearsed the testimony of [two witnesses] during at least five pre-trial meetings 'in addition to their sessions together to get their stories straight' and that the defense had "concocted a rather amazing mosaic of defenses.' In his Reasons for Judgment, the trial judge concluded there was no evidence in the record to support the repeated allegations of coaching, concocting, rehearsing made in plaintiff's post-trial brief. The trial court made its findings after a full hearing on defendant's Motion to Strike in which both parties presented their positions. We find that the trial judge was in the best position to evaluate the professionalism of counsel's conduct. Thus, we find no error in the trial court's judgment finding plaintiff's attorney violated Rule 7 of the Code of Professionalism."¹⁵

- A criticism of a lawyer's lack of professionalism in dealing with associates.

"Rather than using his experience as a senior member of the bar to foster the highest ideals of professionalism in the younger attorneys working under him, respondent used these attorneys as pawns in his scheme. In addition to the harm to the countless clients who were

¹⁴ *Garcla v. Teitler*, 2004 WL 1636982 (E.D. N.Y. 2004), [*aff'd* 443 F.3d 202 (2nd Cir. 2006) citing "W. Dale Nelson, O'Connor: Lawyers 'unhappy lot', Casper Star Trib., Mar. 17, 2004, available at <http://www.casperstartribune.net/articles/2004/03/17/news/wyoming/ababfb532515191d87256e5a000caac8.txt> (last visited July 20, 2004)."

¹⁵ *Silliezar v. East Jefferson General Hospital*, 04-939 (La.App. 5 Cir. 1/11/05), 894 So.2d 373, 381.

unknowingly drawn into his solicitation scheme, respondent's activities caused grave harm to the entire legal profession in Louisiana."¹⁶

- Lack of professionalism evidenced by a lawyer's inappropriate language in a brief.

"However, we grant the motion for sanctions and order that footnote 1 on page 4 and the entire conclusion on page 23 of . . . [the] brief be stricken. In representing their clients, attorneys must act within the bounds of professionalism. We condemn the sort of unprofessional conduct evidenced in the brief submitted to this court. It is clearly inappropriate and unprofessional for [counsel] to utilize [the] appellate brief as a platform for casting aspersions on the integrity of the Family Court and the judiciary."¹⁷

- Concern about a potential lack of professionalism, but relegating the matter to the bar association.

"Beyond the issues addressed above, we are concerned about the tactics that appellant has used to perfect his appeal. These tactics include accusing the trial court of altering the trial transcript and accusing the trial court of bias and prejudice in its conduct of the trial. Both of these accusations would constitute serious ethical misconduct if they had proved true. However, neither of these charges were supported by one scintilla of evidence in the record. Such baseless allegations are insulting and offensive. They also reflect badly on lawyers as a profession and our system of jurisprudence as a whole.

The Louisiana Supreme Court recently approved the Code of Professionalism. Article 7 of that Code continues to emphasize that an attorney "should not engage in personal attacks on other counsel or the court." A lawyer's conduct should be characterized at all times by personal courtesy and professional integrity embodied in this Code. Appellant's groundless allegations about the trial judge clearly violate the Code of Professionalism. With respect to whether these allegations breach other applicable professional standards of conduct for lawyers, we defer that determination to the Disciplinary Board of the Louisiana State Bar Association."¹⁸

- Cautioning counsel not to commit acts of unprofessionalism in the future.

The content of plaintiff's brief is detailed and profuse with allegations of professional misconduct, unethical and illegal behavior. Such allegations are insulting and offensive. Furthermore, these

¹⁶ *In Re O'Keefe*, 2003-3195 (La. 7/2/04), 877 So.2d 79, 88.

¹⁷ *Stroscher v. Stroscher*, 2001-2769 (La.App. 1 Cir. 2/14/03), 845 So.2d 518, 527-528.

¹⁸ *Fox v. Lam*, 25,616 (La.App. 2 Cir. 2/23/94), 632 So.2d 877, 879-880.

scandalous allegations are compounded by the fact that they are totally uncorroborated by any evidence. Thus, without any record evidence to support such offensive allegations, plaintiff counsel's brief is offensive to this court and in violation of Rule 2-12.4.

Whether to impose sanctions under this Rule is within the discretion of this Court. However, because it is [counsel's] first violation of our internal rules, we choose not to hold him in contempt. Rather, this Court reprimands [counsel] and directs him to consider carefully before filing a brief accusing a fellow member of the bar of ethical misconduct without any supporting evidence. Such transgressions will result in sanctions in the future.¹⁹

- A complaint about a lack of candor:
"We do not know why counsel for Hi Tech thought it appropriate to refrain from informing this court of matters so germane to this appeal, but we are certainly troubled by the level of professionalism and apparent lack of candor it reflects."²⁰
- A remand order with some real "teeth":
"Nevertheless, we suggest that upon remand the district court may wish to inquire as to whether that schedule can be substantially expedited, given the fact that the parties have already had many months within which to conduct discovery. We also express the hope that on remand counsel will proceed in an atmosphere of cooperation and approach the case with common sense and professionalism. Their goal should be to achieve the client's objectives without inappropriate conduct, unnecessary filings, insults and references to complete irrelevancies." Activities of this type detract from the object of the litigation, i.e., the fair, full and prompt resolution of the parties' differences, and create needless expense for the litigants. {Footnote 3}

{Footnote 3} We direct this remark particularly at counsel for plaintiff, whose own inequitable conduct squandered the injunctive relief initially granted to J-Rich. In addition, counsel for plaintiff has persistently mischaracterized both this court's and the district court's prior orders in this case and has directed accusations at both courts and opposing counsel in his filings, as well as matters having nothing to do with the merits of the case. We remind counsel of his duty, as an officer of the court, "to proceed only by means that are truthful and honorable, and

¹⁹ *Galle v. New Orleans School Board*, 693 So.2d 692, 696.

²⁰ *Hi Tech Trans, LLC v. New Jersey*, 382 F.3d 295, 309 (3rd Cir. 2004).

to avoid offensive personality.” Mich. Rules of Prof’l Conduct R. 6.5 cmt. (2002).²¹

4. What Does “Professionalism” Have to Do with Negotiations?

Are we required to lie for our clients? Of course not. But are we required to negotiate forcefully for our clients? Lawyers do this every day in a variety of circumstances -- in contract negotiations; in alternative dispute resolution tribunals; and as part of the litigation process.

“Ethics” is the term that is commonly applied to lectures about the ABA’s Rules of Professional Responsibility and its predecessor, the Code of Professional Conduct. These Rules, however, do not use the word “ethics” at all. The three main federal rules and statutes that regulate sanctionable conduct (FRCP 11, FRAP 38, and 28 U.S.C. §1927) do not use the term “ethics” either.

The problem is that there is an unresolved tension between two concepts: (a) the need to represent the client fully and zealously and to maintain client confidences, and (b) the expectation of some members of the public and press, and of some federal regulators, that lawyers, as officers of the Court, should reveal matters that can cause losses to others. These two concepts are inherently irreconcilable; you cannot fully protect one without eviscerating the other. The greater the protection one gives to client confidences, the less “truth” the lawyer is able to reveal, for any revelation of a client confidence is a breach of that obligation. On the other hand, the more one seeks to have lawyers disclose information that may prevent losses to non-clients, the less protection a client has for the confidences reposed in and disclosed to the lawyer.

“I don’t see why we should not come out roundly and say that one of the functions of the lawyer is to lie for his client; and on rare occasions, as I think I have shown, I believe it is.” Charles Curtis, “The Ethics of Advocacy.”²²

These two tensions are apparent by looking at what some have said about a lawyer’s role.

- “To mislead an opponent about one’s true settling point is the essence of negotiation.” White, MacElvelly “Ethical Limitations on Lying in Negotiations,” 1980 American Bar Foundation RES.J. 926, 928.
- Justice Stevens: “I still believe that most lawyers are wise enough to know that their most precious assets is their professional reputation.”²³

²¹ *J-Rich Clinic, Inc. v. Cosmedic Concepts, Inc.*, 98 Fed.Appx. 444, 448 (6th Cir. 2004).

²² *LYING*, Bok, Sissela, pg. 306 & 307, Vintage Books, Second Edition, 1999.

²³ *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 413, 110 S.Ct. 2447, 2464-65

- “Just as the orderly and systematic slaughter which we call war is thought perfectly right under certain circumstances, though painful and revolting: so in the word-contests of the law-courts, the lawyer is commonly held to be justified in untruthfulness within strict rules and limits: for an advocate is thought to be over-scrupulous who refuses to say what he knows to be false, if he is instructed to say it.” H. Sidgwick, *The Methods of Ethics*, 7th Ed. (London: Macmillan & Co., 1907).
- “We might exercise our supervisory powers if we thought there were an ethical violation involved.” But the Court would not exercise supervisory powers for a breach of a potential professional violation. *U.S. Bautista*, 23 F.3d 726, 732 (2nd Cir. 1994), *cert. den.* 513 U.S. 862 (1994).²⁴

5. A Brief History of the ABA Model Rules

In ascertaining whether there always has been a dichotomy between ethics and professionalism, it is instructive to look at the history of bar promulgations on the subject.

The American Bar Association’s original Canon of Professional Ethics was adopted on August 27, 1908 and can be traced back to the Alabama Bar Association’s 1887 Code of Ethics and from there back to two books published in 1836 and 1854.²⁵ For almost a hundred years the Canons formed the touchstone of lawyer conduct.

The Canons evolved in 1969 into the Model Code of Professional Responsibility. The Model Code was divided into “Ethical Considerations,” aspirational goals for attorneys, written in hortatory language, and “Disciplinary Rules,” mandatory provisions akin to penal statutes which formed the basis for disciplinary proceedings.

Among the laudatory goals and formulations that the “Ethical Considerations” articulated were:

- “Maintaining the integrity and improving the competence of the bar to meet the highest standards is the ethical responsibility of every lawyer.” EC 1-1.

(1990), Justice Stevens, concurring in part and dissenting in part.

²⁴ The alleged breach was a prosecutor talking to a witness during an adjournment; the Court find no problem with this since the issue was elicited by the prosecutor on re-direct and the witness was subjected to cross-examination on this topic.

²⁵ A history of the ABA’s rules can be found in ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT, Second Edition, pages 1-2 (1992), published by American Bar Association’s Center for Professional Responsibility. The two books were: PROFESSIONAL ETHICS, by Judge George Sharswood (1854), and A COURSE OF LEGAL STUDY (2d ed. 1836) by David Hoffman.

- “A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. He should be temperate and dignified . . .” EC 1-5.
- “To lawyers especially, respect for the law should be more than a platitude.” EC 1-5.
- “A lawyer should be courteous to opposing counsel and should accede to reasonable requests . . . which do not prejudice the rights of his client. He should follow local customs of courtesy and practice, unless he gives timely notice to opposing counsel of his intention not to do so.” EC 7-38.
- “A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it.” EC 7-23.
- “Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal . . . is inconsistent with the fair administration of justice, and it should never be participated in or condoned by lawyers.” EC 8-5.
- “Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism.” EC 8-6.
- “When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.” EC 9-2.
- “Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and the courts and the judges thereof; . . . to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.” EC 9-6.

In 1983 the ABA adopted the Model Rules of Professional Conduct. Gone were the aspirational goals that the Ethical Considerations illuminated. In their place were purely minimal standards of conduct written in the style of a penal code – the three phrases used are: “a lawyer shall not,” “a lawyer shall,” and “a lawyer may.” The Bar’s transformation was complete. It had come full circle from a profession whose members took it for granted that they owed duties to the public and to the courts, to one whose written rules provided both high-minded guidelines as well as disciplinary rules, to one whose sole guidance was now found in a quasi-criminal statute.

At the same time as the Bar’s own rules were evolving, a similar evolution was taking place in the Federal Rules of Civil Procedure. A major shift occurred in 1983 (the same year that the ABA adopted the Model Rules of Professional Conduct) when Rule 11 was amended to

become a penal provision allowing sanctions to be imposed against counsel. The former version of the rule had been rarely used even in the early 1980s, although there was a strong feeling that lawyers were abusing the system²⁶ and a perceived need to put corrective measures in place. The Rule was amended again in 1993, “motivated by a desire to curb some of the abuses surrounding Rule 11 motion practice.”²⁷

Under the Federal Rules as well as state disciplinary procedures, only conduct of an egregious nature is dealt with. Unfortunately, because the old Code was rightly called one of “Professional *Ethics*,” we tend to think that the current Model Rules are also ethical standards; they are not. An attorney can take positions that many would find uncivil or even morally questionable and still abide by the Model Rules. Likewise, an attorney can have a reputation in the bar as an unfair “hardball” litigator, intransigent on every issue, even ones of courtesy, and still comply with Rule 11. This may be the reason for the evolution of the “professionalism” standards and the various codes of courtesy that are being adopted by many local bar associations around the country. Although it must be admitted that not all such “professionalism” codes are limited to litigation, when one reviews them as a whole, it is clear that abusive litigation conduct is at the heart of what such formulations are designed to address.

In 2002 the ABA adopted its most current version of the Model Rules, the Ethics 2000 version (E2K).

6. The Current Model Rules and “Truthfulness”

To some, calling the Model Rules “ethical” rules is a misnomer, for the Rules allow for questionable behavior from a moral outlook that is defensible only when looked at from the dual viewpoints of the adversarial process and the perceived need to preserve client confidences. To some, calling the Model Rules “ethical” rules is a misnomer, for the Rules allow for questionable behavior from a moral outlook that is defensible only when looked at from the dual viewpoints of the adversarial process and the perceived need to preserve client confidences. When the Model Rules were drafted, the ABA specifically *rejected* requiring truth in negotiations.²⁸ The preamble contained hortatory language which was adopted:

“As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others.”

²⁶ Mansfield, *Compliance with 1983 Changes In Rules of Civil Procedure*, 190 N.Y.L.J. 1 (1983). Also see: Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* §1331 *History of Rule 11* (1990).

²⁷ Wright and Miller, *id.*

²⁸ The history of the Model Rules is found in “The Legislative History of the Model Rules of Professional Conduct: Their Development in the ABA House of Delegates,” published by the Center for Professional Responsibility, American Bar Association, 1987.

In the Rules themselves, however, there is no requirement of honest dealing. As finally adopted, the Rules reflect a tension between maintaining the attorney-client privilege and determining under what circumstances an attorney can reveal otherwise privileged communications. Rule 1.6, as proposed, required an attorney to reveal communications the lawyer reasonably believed necessary:

“To prevent the client from committing a . . . fraudulent act that the lawyer reasonably believes is likely to result in . . . substantial injury to the financial interests or property of another.”

As proposed, privileged information was not a bar; an attorney was required to speak out to prevent substantial financial injury to another even if this meant the client would get less. This rule, as proposed, enshrined the concept of a fair deal. This language was deleted, however because of the fear that the proposed Rule would transform a lawyer “into a ‘policeman’ over a client.”²⁹ The language requiring lawyers to act if the client was going to commit a “fraudulent act” causing substantial injury to the financial interests or property of others disappeared completely from the final text of Rule 1.6, leading one to the conclusion that the Bar Association believes it proper for a lawyer to remain silent in the face of actions that, fraudulent or not, can cause substantial injury to the financial interests or property of another as long as the information is privileged or confidential. This conclusion, unfortunately, appears valid because of a corresponding change in proposed Model Rule 4.1. As proposed, Rule 4.1 prevented a lawyer from knowingly making a false statement of material fact or law and would have required disclosure of client confidences in furtherance of the Rule. The language requiring truthfulness, even if it revealed a potential client confidence, however, was deleted.³⁰

Truthfulness and fair dealing were not the requirements of the Model Rules. The ABA Comments to the Rules make for interesting reading, for they specifically allow “puffing,” “failing to be truthful about settlement amounts,” and other matters as long as they do not constitute “fraud.”³¹

²⁹ Discussion, February, 1993 Mid-Year Meeting, Legislative History, p. 48.

³⁰ The revision of Model Rule 4.1, showing the deleted and added language, is as follows:

“(a) In the course of representing a client a lawyer shall not knowingly:

(1a) make a false statement of material fact or law to a third person; or

(2b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

~~(b) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.”~~

³¹ The ABA Official Comment to Rule 4.1 entitled “Statements of Fact,” reads:

The Comment to Rule 1.6 interacted with the Comments to Rule 4.1; truth is not the objective. In negotiations, a lawyer is entitled (but never required) to reveal client confidences if making a disclosure “facilitates a satisfactory solution.” Facilitation of a satisfactory solution is not necessarily one that is equitable to both sides. There is no requirement of revealing a confidence in order to reveal the truth. The Rule contains a clear demarcation; conduct that is “fraudulent” is forbidden, but all else is merely part of negotiating strategy.

In light of these two rules, other language of the Code, such as that in Rule 2.1 allowing (but not mandating) lawyers to consider moral issues, may tend to ring somewhat hollow.³²

These rules, which relate to negotiation, are sharply contrasted by the rules regulating conduct before a tribunal. While the language of 3.3(a)(1) and 4.1(a) is identical in that a lawyer “shall not knowingly make a false statement of material fact or law, . . .” there was an attempt made to subordinate the lawyer’s duty of candor to the court to the rules relating to privilege. The amendments were defeated because as the discussion notes, “the duty of candor toward the court was regarded as paramount.” Legislative History, p. 122. (emphasis supplied). The ABA Comment to Rule 4.1 specifically allows statements about “a party’s intention as to an acceptable settlement of a claim” to be exempted from the rule prohibiting false statements of “material fact”; apparently you can lie with impunity about your settlement authority. There is, however, no such exemption in the comments to Rule 3.1 concerning candor to the tribunal, and probably for good reason. A lawyer who, during a settlement conference with a judge, misstates the client’s intention as to an acceptable settlement undoubtedly acts at his or her peril. While there is a special rule (3.4) relating to “fairness to opposing party and counsel,” it seems solely directed at trial procedure.

The limited rules relating to negotiations, as opposed to the broader and more detailed rules relating to litigation, have been the subject of

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intention as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principal except where non-disclosure of the principal would constitute fraud.

³² Rule 2.1 provides:

Rule 2.1 and Comment as Adopted

Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer *may* refer not only to law but to other considerations such as *moral*, economic, social and political factors, that may be relevant to the client’s situation. (emphasis supplied).

much commentary. In her famous Law Review Article, "Bargaining and the Ethics of Process," Professor Norton noted:

The Model Rules do not exempt negotiation from ethical constraints, but neither are the rules drafted to address the demands of bargaining with the same specificity that they address the demands of litigation. No rule or law requires fairness during negotiation . . . * * * [In] negotiation, where there is only the sparsest written guidance, the parties must decide for themselves what is legal, what is factual, and what is ethical.³³

Professor Bok, in her book, *Lying*, has a similar caveat:

"But codes of ethics function all too often as shields; their abstraction allows many to adhere to them while continuing their ordinary practices. In business as well as in those professions that have already developed codes, much more is needed. The codes must be but the starting point for a broad inquiry into the ethical quandaries encountered at work. Lay persons, and especially those affected by the professional practices, such as customers or patients, must be included in these efforts, and must sit on regulatory commissions. Methods of disciplining those who infringe the guidelines must be given teeth and enforced."³⁴

Courts themselves have not hesitated to state how they feel about lawyer's comments in pending cases: lawyers are held to high standards, regardless of the existence of some ABA or Bar-promulgated rule.

- "[A]ttorneys are officers of the court, and " 'when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.'³⁵
- " '[O]nce a lawyer is admitted to the bar, although he does not surrender his freedom of expression, he must temper his criticisms in accordance with professional standards of conduct.'³⁶

7. The Ethics 2000 Debate

The new ABA Model Rules ("E2K") started out to make changes in this outcome. Previous to its proposal, a number of states had rejected the ABA Model Rules restrictions in favor of a more disclosure-oriented

³³ Eleanor Holmes Norton, *Bargaining and the Ethics of Process*, 64 N.Y.U. L.Rev. 493, 529 (1989).

³⁴ Bok, *Lying*.

³⁵ *Holloway v. Arkansas*, 435 U.S. 475, 486 (1978), quoting with approval from *State v. Brazile*, 75 So.2d 856 (La. 1954).

³⁶ *Travelers Insurance Company v. Liljeberg Enterprises, Inc.*, 38 F.3d 1404, 1409 (5th Cir. 1994), quoting from *U.S. District Court v. Sandlin*, 12 F.3d 861, 866 (9th Cir. 1993).

approach. The Ethics 2000 Advisory Committee looked at and approved of these approaches.

The ABA House of Delegates³⁷ approved a change in the Model Rules to allow (but not compel) a lawyer to disclose information that may result in reasonably certain death or substantial bodily injury. On the other hand, by a 63% vote, the House defeated the Ethics 2000 proposal to allow an attorney to reveal crimes or frauds that are reasonably certain to result in substantial financial injury in the limited case where the client is using or has used the attorney's services in furtherance of the fraud. In light of this action, the Ethics 2000 committee withdrew a related proposal. The text of the proposal and the House of Delegate's actions, showing additions and deletions to the previous rule, and deletions from the text of the ABA's E2K Committee's new proposed rule, is set forth below:

RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except for disclosures that are gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, and except as stated in or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal such information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

[Amendment to reject the Ethics 2000 version and go back to previous version rejected by a vote of 213 to 207]

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent reasonably certain death or substantial bodily harm; or

[Amendment to delete this provision entirely passed by 63%]

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services:

[The next provision was withdrawn in light of deletion of 1.6(b)2.]

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

[These provisions passed]

³⁷ The ABA House of Delegates approved the change in this rule in August 2001 and approved the entire reworked Rules in the mid-year 2002 meeting.

(4) to secure legal advice about the lawyer's compliance with these Rules;

(2) (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

8. Most Basic Negotiation: Your Own Job

There are remarkably few cases about attorneys negotiating about their own jobs. Two of the most important, however, were decided by the U.S. Fifth Circuit.

*Douglas v. DynMcDermott*³⁸ involved an African-American female lawyer, an in-house counsel, who was concerned about discrimination against her. A good synopsis of the case appears in *Kaible v. U.S. Computer Group, Inc.*, 27 F. Supp. 2d 373 (E.D. N.Y. 1998), which described the Fifth Circuit's rejection of the plaintiff's claim as a "stinging opinion."

"In June 1994, general counsel asked the plaintiff to attend a meeting with DOE auditors on compliance with the contract's anti-bias requirements. In response to a query about EEOC complaints from employees, the plaintiff said the situation was "a class action waiting to happen." She also said one worker, who she named, was dissatisfied with the resolution of her complaint. Displeased with her statements, general counsel criticized her for poor judgment at the meeting in a written performance evaluation two weeks later. The plaintiff responded with a five page letter, copied to a DOE whistle-blower officer, complaining that she had suffered racial and sexual discrimination. The plaintiff's letter also discussed the dissatisfied co-worker's case. DynMcDermott fired the plaintiff, claiming she breached client confidences by sending her letter to outside parties. The plaintiff sued, alleging in part that she was terminated in retaliation for reporting discrimination. A federal jury agreed." The plaintiff, when asked at the time, said that the DOE whistle-blower officer should not treat her letter as a whistle-blower complaint.

The problem was not that the plaintiff may not have had a valid Title VII claim or even that her letter may not have constituted opposition to employment discrimination. Rather, the attorney's obligation to maintain client confidences trumps even the certain Title VII rights. The two rights must be balanced, and the client's right of confidentiality can

³⁸ 144 F.3d 364 (5th Cir. 1998)

trump Title VII rights of the in-house attorney. As the *DynMcDermott* court³⁹ stated, “although she surely did not surrender her Title VII rights when she signed on with DynMcDermott as in-house counsel . . . she did in fact assume professional responsibilities that constrained her exercise of those rights.” 144 F.3d 376. Therefore, ethical breaches were unprotected under Title VII. The key was that Title VII does not give an in-house attorney leave to breach client confidences.

The solution to the problem that the attorney in *DynMcDermott* faced – how to assert your Title VII rights ethically and professionally – in fact had been discussed 15 years earlier in *Doe v. A. Corporation*, 709 F.2d 1043, (5th Cir. 1983). There, an in-house attorney who had resigned attempted to bring a lawsuit on behalf of himself and a class of employees about benefits the attorney claimed was due. The *Doe* court held that the attorney could not represent the class but could bring the action on his own behalf. The court noted that while an in-house attorney can bring a lawsuit to vindicate rights, the client’s interest in confidentiality must be protected; so important was the confidentiality issue that the names of the parties in the lawsuit were disguised. There was no indication that confidences were revealed in the mere filing of the petition, and the court also emphasized that the confidences the anonymous “Doe” had received could not even be disclosed to another lawyer representing other claimants. “As a member of a profession that enjoys the exclusive license to engage in the practice of law, he is required to deny requests that would violate the ethical tenets of his profession even at the sacrifice of self-interest.” 709 F.2d. 1047.

A third interesting case about attorneys and their own employment is the Chicago case of *Krieger v. Adler, Kaplan & Begy*.⁴⁰ A Washington D.C. attorney, who had been terminated from a D.C. firm, negotiated to move to Chicago to join a Chicago firm. After two “rocky” years, the attorney was discharged from the Chicago firm. The lawyer promptly sued, claiming among other things that he was fraudulently induced to move to Chicago and take the job. Among the allegations that led to the fraudulent inducement claim were representations the law firm had made to him that it was a “*reputable, well managed, stable law firm, providing ethical practice of law and proper staffing, management and supervision in matters in litigation.*” The Court held that, even if these statements were false, there were “puffery” made in the process of recruitment and cannot qualify as fraudulent misrepresentations because the plaintiff “could not have justifiably relied on such obvious self-touting.” This is

³⁹ For a case that allowed the parties to amend their pleadings concerning whether confidences were revealed and a discussion of First Amendment rights, see *Washington v. Davis*, 2001 WL 1287125, 13 A.D. Cases 1043 (E.D. La. 2001).

⁴⁰ 3 Wage & Hour Cas. 2d (BNA) 1710, 1997 WL 323827 (N.D. Ill. 1997)

because “such puffery is common between a prospective employer and employee and is a statement of opinion that cannot give rise to fraud.”⁴¹

9. Restating Liability: Two ALI Projects

Professionalism concerns not merely a lawyer’s relationship with other lawyers and with the courts, but also with third parties. Two ALI projects concern lawyer liability to third parties: the Restatement of the Law Governing Lawyers⁴² and the Restatement of Torts.

The Restatement of the Law Governing Lawyers (“ALI Lawyers Restatement”) contains a number of provisions that directly relate to third party liability. §56 states that a lawyer can be liable to a nonclient “when a nonlawyer would be [liable] in similar circumstances.” The examples given under §56 include: a fraud claim against a lawyer who “knowingly helps a client deceive”⁴³; assisting a client commit a tort through acts which are themselves tortious;⁴⁴ a fraudulent misrepresentation that is something more than “legally innocuous hyperbole”;⁴⁵ as well as liability under federal securities laws, antitrust statutes, RICO, and consumer protection laws.

The basis of this liability is the duty of care that lawyers owe to nonclients under §51 of the ALI Lawyer Restatement.⁴⁶ While some have

⁴¹ *Id.*, on reconsideration in part, 1997 WL 349988 (N.D. Ill. 1997).

⁴² ALI Restatement of the Law Third, The Law Governing Lawyers (2000).

⁴³ ALI Lawyers Restatement §56, Comment c, p. 417.

⁴⁴ *Id.*

⁴⁵ ALI Lawyers Restatement §56, Comment f, p. 418. This comment begins: “Misrepresentation is not part of proper legal assistance . . .”

⁴⁶ §51 of the ALI Lawyer Restatement (“Duty of Care to Certain Nonclients”) provides:

For purposes of liability under § 48, lawyer owes a duty to use care within the meaning of § 52 in each of the following circumstances:

- (1) to a prospective client, as stated in § 15;
- (2) to a nonclient when and to the extent that:
 - (a) the lawyer or (with lawyer’s acquiescence) the lawyer’s client invites the nonclient to rely on the lawyer’s opinion or provision of other legal services, and the nonclient so relies; and
 - (b) the nonclient is not, under applicable tort law, too remote from the lawyer to be entitled to protection;
- (3) to a nonclient when and to the extent that:
 - (a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer’s services benefit the nonclient;
 - (b) such a duty would not significantly impair the lawyer’s performance of obligations to the client; and
 - (c) the absence of such a duty would make enforcement of those obligations to the client unlikely; and
- (4) to a nonclient when and to the extent that:

criticized this standard as being too harsh on lawyers, since it does not look to whether the assistance to the nonclient is the sole (rather than simply one) of the primary purposes of the lawyer's actions,⁴⁷D. Culver Smith, III, "Professional Liability of Lawyers in Florida: Theories of Liability," PLLF-FL-CLE 1-1 (2002), commenting on and quoting from Mallen & Smith, *Legal Malpractice*, §7.8 at 697-698 (West Group 5th ed. 2000). it does attempt to create a fact-specific balancing test while at the same time apparently allowing lawyers to attempt to limit liability by contractual language. This has been termed the "contractarian" view of liability.⁴⁸

The comments to (but not the black letter of) §51 seem to acknowledge the possibility of contractual limitations on the scope of the duty and even indicate that the duty is less if there is experienced counsel on the other side of the table.⁴⁹ There is no explanation, however, why Law-

(a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient;

(b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach;

(c) the nonclient is not reasonably able to protect its rights; and

(d) such a duty would not significantly impair the performance of the lawyer's obligations to the client.

⁴⁷ "One commentator characterizes the Restatement approach as 'unique and questionable':

"The 'primary objectives' inquiry is not the same as the judicially developed, intended-beneficiary standard. The focus of the common law is whether that nonclient is the intended beneficiary of the lawyer's retention; whereas the Restatement asks only if a benefit is 'one of the primary objectives.' Unlike the common-law principle, the Restatement does not look to the primary purpose, but only for one of several primary purposes. This deviation from the case law raises factual issues regarding the client's motives. Further, the multiple objectives could be inconsistent, so that claimant's perceptions of the lawyer's obligations could be in conflict with the client's objectives. The risk of conflicting interests is minimized, if not eliminated, by 'the intended beneficiary' standard."

⁴⁸ See, e.g., Richard W. Painter, "Rules Lawyers Play By," 76 N.Y.U. Law Rev. 665, 696 (2001).

⁴⁹ §51, Comment (e), provides in part (emphasis supplied):

A lawyer may avoid liability to nonclients under Subsection (2) by making clear that an opinion or representation is directed only to a client and should not be relied on by others. Likewise, a lawyer may limit or avoid liability under Subsection (2) by qualifying a representation, for example by making clear through limiting or disclaiming language in an opinion letter that the lawyer is relying on facts provided by the client without independent investigation by the lawyer (assuming that the lawyer does not know the facts provided by the client to be false, in which case the lawyer would be liable for misrepresentation). The effectiveness of a limitation or disclaimer depends on whether it was reasonable in the circumstances to con-

yer X's duties to a nonclient should diminish solely because of the presence or absence of Lawyer Y on the opposite end of the table, apparently leaving one with the possibilities that either (a) experienced counsel Y shouldn't or wouldn't let Lawyer X get away with something bad, or, if something bad did happen, then (b) the nonclient should sue its own counsel Y rather than the other side's Lawyer X. This apparent rationale, however, could be attacked by the argument that, if something bad did happen, then it would appear Lawyer Y really wasn't as experienced as the nonclient anticipated, meaning that Lawyer X's duties to the nonclient shouldn't be diminished.

Unlike the ABA's elevation of confidentiality above the obligation to prevent financial loss, the ALI Lawyer Restatement §67 allows a lawyer to disclose confidential information to "prevent, rectify, or mitigate"⁵⁰ a "substantial financial loss"⁵¹ to a third person caused by a client crime or fraud even if the "loss has not yet occurred,"⁵² but this can occur only if the "client has employed or is employing the lawyer's services in the matter in which the . . . fraud is committed."⁵³ Even if these criteria are met, §67 cautions that the attorney must first make a "good faith effort to persuade the client not to act"⁵⁴ if this is feasible or ask the client to "warn the victim"⁵⁵ or fix the problem. §67 closes with the caution that a lawyer who either acts or fails to act under its principles is not "solely by reason of such action or inaction"⁵⁶ liable in damages -- apparently it takes action or inaction plus something else.

There are four Illustrations to §67 that are pertinent to non-litigation negotiations.⁵⁷ These Illustrations, unlike the E2K Model Rules 1.6 and

clude that those provided with the opinion would receive the limitation or disclaimer and understand its import. The relevant circumstances include customary practices known to the recipient concerning the construction of opinions *and whether the recipient is represented by counsel or a similarly experienced agent.*

⁵⁰ ALI Lawyer Restatement §67(2).

⁵¹ ALI Lawyer Restatement §67(1)(a).

⁵² ALI Lawyer Restatement §67(1)(b).

⁵³ ALI Lawyer Restatement §67(1)(d).

⁵⁴ ALI Lawyer Restatement §67(3).

⁵⁵ *Id.*

⁵⁶ ALI Lawyer Restatement §67(4).

⁵⁷ These Illustrations are:

3. Client has been charged by a regulatory agency with participation in a scheme to defraud Victim. Client seeks the assistance of Lawyer in defending against the charges. The loss to Victim has already occurred. During the initial interview and thereafter, Lawyer is provided with ample reason to believe that Client's acts were fraudulent and caused substantial financial loss to Victim. Because Lawyer's services were not employed by Client in committing the fraud, Lawyer does not have discretion under this Section to use or disclose Client's confidential information.

4.1, recognize that a client cannot have the lawyer perform work that causes grievous financial losses and then expect the lawyer to remain silent, notwithstanding any expectations or rules of confidentiality.⁵⁸

4. The same facts as in Illustration 3, except that the law of the applicable jurisdiction provides that each day during which a wrongdoer in the position of Client fails to make restitution to Victim constitutes a separate offense of the same type as the original wrong. Notwithstanding the continuing-offense law, commission of the fraudulent act of Client has already occurred without use of Lawyer's services. As in Illustration 3, Lawyer does not have discretion under this Section to use or disclose Client's confidential information.

* * *

5. Lawyer has assisted Client in preparing documents by means of which Client will obtain a \$5,000,000 loan from Bank. The loan closing occurred on Monday and Bank will make the funds available for Client's use on Wednesday. On Tuesday Client reveals to Lawyer for the first time that Client knowingly obtained the loan by means of a materially false statement of Client's assets. Assuming that the other conditions for application of Subsection (2) are present, while Client's fraudulent act of obtaining the loan has, in large part, already occurred, Lawyer has discretion under the Subsection to use or disclose Client's confidential information to prevent the consequences of the fraud (final release of the funds from Bank) from occurring.

6. The same facts as in Illustration 5, except that Lawyer learned of the fraud on Wednesday after Bank had already released the funds to Client. Under Subsection (2), Lawyer's use or disclosure would be permissible if necessary for the purpose, for example, of enabling Bank to seize assets of Client in its possession or control as an offset against the fraudulently obtained loan or to prevent Client from sending the funds overseas and thereby making it difficult or impossible to trace them.

⁵⁸ The full text of §67 ("Using or Disclosing Information to Prevent, Rectify, or Mitigate Substantial Financial Loss) reads:

(1) A lawyer may use or disclose confidential client information when the lawyer reasonably believes that its use or disclosure is necessary to prevent a crime or fraud, and:

- (a) the crime or fraud threatens substantial financial loss;
- (b) the loss has not yet occurred;
- (c) the lawyer's client intends to commit the crime or fraud either personally or through a third person; and
- (d) the client has employed or is employing the lawyer's services in the matter in which the crime or fraud is committed.

(2) If a crime or fraud described in Subsection (1) has already occurred, a lawyer may use or disclose confidential client information when the lawyer reasonably believes its use or disclosure is necessary to prevent, rectify, or mitigate the loss.

(3) Before using or disclosing information under this Section, the lawyer must, if feasible, make a good-faith effort to persuade the client not to act. If the client or another person has already acted, the lawyer must, if feasible, advise the client to warn the victim or to take other action to prevent, rectify, or mitigate the loss. The lawyer must, if feasible, also advise the client of the lawyer's ability to use or disclose information as provided in this Section and the consequences thereof.

(4) A lawyer who takes action or decides not to take action permitted under this Section is not, solely by reason of such action or inaction, subject to professional discipline, liable for damages to the lawyer's client or any third person, or barred

While §67 states in a comment (but not in the black letter text) that these exceptions to confidentiality are “extraordinary,”⁵⁹ it is clear that no longer can lawyers hide behind the Model Rules; courts can and will be looking to the ALI Lawyer Restatement as another basis to find liability.

The second basis used to impart nonclient liability to lawyers is §552 of the ALI Restatement (Second) of Torts,⁶⁰ which concerns justifiable reliance on the advice of a professional. §552 has been used by courts in addressing lawyers liability to those other than their clients.⁶¹

10. A Curious Paradox

All of this leads to a curious paradox. Under the ALI Lawyer Restatement, “a lawyer representing a party in litigation has no duty of care to the opposing party,”⁶² but representations in opinions and certain other matters can be actionable,⁶³ and it cannot be unexpected that representations in negotiations themselves may become actionable.⁶⁴ On the other

from recovery against a client or third person.

⁵⁹ ALI Lawyer Restatement §67, Comment (b), p. 506.

⁶⁰ Torts Restatement §552 reads, in part:

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

⁶¹ See, e.g., *First National Bank of Durant v. Trans Terra Corporation International*, 142 F.3d 802 (5th Cir. 1999); *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787 (S.Ct. Tex. 1999).

⁶² ALI Lawyer Restatement §51, Comment c, p. 358.

⁶³ ALI Lawyer Restatement §51(2)(a) deals with reliance upon a lawyer’s “opinion or provision of other legal services” relied upon by the nonclient; §52(3) involves a lawyer’s services that, with the client’s knowledge, benefit the nonclient; and §52(4) concerns a lawyer taking appropriate action involving a breach of fiduciary duty owed by the client to the nonclient involving fraud.

⁶⁴ ALI Restatement §67 concerning when a lawyer is allowed to breach confidentiality to prevent a fraud that “threatens substantial financial loss.” Although none of the Illustrations deal with negotiations, the black letter text does not exclude negotiations from its scope. For more on issues involving negotiations and the ABA rules, see: M. Rubin, “The Ethics of Negotiations: Are There Any?” 56 Louisiana Law Review 447 (1995).

hand, under E2K Model Rule 4.1, misrepresentations in negotiations are not a basis of liability if the misrepresentations concern negotiating position or even, apparently, on the value of the item about which negotiations are occurring, for these are not “material facts” under the comments to Rule 4.1. Thus, is one to gather from all this that an attorney apparently can be less truthful in a litigation arena than in a negotiation? This runs directly counter to the ABA’s Model Rules, which place far greater scrutiny on an attorney’s representations in tribunal settings than in negotiations.⁶⁵

11. Ethics, Professionalism, and Tactics during Negotiation

Applying concepts of “ethics” and “professionalism” is not a matter merely of litigation tactics, where “hard-ball” antics are a matter of record, either in depositions or in trial. The daily process of negotiations in which each every lawyer is engaged needs to be considered.

Discussions of what is and is not “ethical” during negotiations have consumed reams of paper with law review articles containing, in the aggregate, thousands of footnotes. On the one side is the view that there are two precepts which should guide the lawyer’s conduct in negotiations: honesty and good faith; and that a lawyer may not accept a result that is unconscionably unfair to the other party.⁶⁶ At the other end of the spectrum are those who argue that obtaining the best interest of the client is the proper overall goal and should be pursued vigorously in the absence of outright fraud. Discussions of this view can be found in the writings of Professors James J. White⁶⁷ and Charles Curtis.⁶⁸ The tension, at base, is not necessarily between “ethics” as an abstract notion, but rather whether various negotiation tactics are permitted or prohibited by the Model Rules.

The high regard with which negotiating tactics are viewed by some can be seen in titles to law review articles such as:

- “The Ethics of Lying in Negotiations”;⁶⁹
- “Negotiation Ethics: How to Be Deceptive Without Being Dishonest: How To be Assertive Without Being Offensive”;⁷⁰

⁶⁵ *Id.* Compare E2K Model Rule 3.3 (dealing with candor to the court in tribunal settings) to E2K Model Rule 4 (dealing with third parties).

⁶⁶ What Professor Norton (p. 513) has termed the “universal” position is exemplified and was first expounded in a 1975 law review article by Judge Alvin B. Rubin, 35 La.L.Rev. 577, 589, *A Causerie on Lawyers’ Ethics in Negotiation*.

⁶⁷ White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 Am. B. Found. RES.J. 926.

⁶⁸ Curtis, *The Ethics of Advocacy*, 4 Stanford L.Rev. 3 (1951). Professor Norton calls Professor Curtis’s view “stark traditionalism,” Norton at p. 513.

⁶⁹ Wetlaufer, *The Ethics of Lying in Negotiations*, 76 Iowa L.Rev. 1219 (1990).

⁷⁰ Craver, 38 S. Tex. L. Rev. 713 (1997)

- “Professionalism: Lip Service or Life Style”;⁷¹
- “Ethics on the Table: Stretching the Truth in Negotiations”;⁷² and
- “Rethinking the Way Law Is Taught: Can We Improve Lawyer Professionalism by Teaching Hired Guns to Aim Better?”⁷³

Many of these articles contain a search for principles that should guide attorneys during negotiations. The fact that the authors of these articles have felt a need to develop criteria and to articulate them is indicative of the fact that the Model Code and the Model Rules are deficient in this regard.

The tension is between being an effective negotiator and being truthful and has been noted succinctly and clearly by Professor Wetlaufer:

Effectiveness in negotiations is central to the business of lawyering and a willingness to lie is central to one's effectiveness in negotiations. Within a wide range of circumstances, well-told lies are highly effective. Moreover, the temptation to lie is great not just because lies are effective, but also because the world in which most of us live is one that honors instrumental effectiveness above all other things. Most lawyers are paid not for their virtues but for the results they produce. Our clients, our partners and employees, and our families are all counting on us to deliver the goods. Accordingly and regrettably, lying is not the province of a few 'unethical lawyers' who operate on the margins of the profession. It is a permanent feature of advocacy and thus of almost the entire province of law.

Our discomfort with that fact has, I believe, led us to create and embrace a discourse on the ethics of lying that is uncritical, self-justificatory and largely unpersuasive. Our motives in this seem reasonably clear. Put simply, we seek the best of both worlds. On the one hand, we would capture as much of the available surplus as we can. In doing so, we enrich our clients and ourselves. Further, we gain for ourselves a reputation for personal power and instrumental effectiveness. And we earn the right to say we can never be conned. At the same time, on the other hand, we assert our claims to a reputation for integrity and personal virtue, to the high status of a profession, and to the legitimacy of the system within which we live and

⁷¹ Sowle, *Professionalism: Lip Service or Life Style*, 59 Jan. Or. St. B. Bull. 33 (1999).

⁷² Dahl, *Ethics on the Table: Stretching the Truth in Negotiations*, 8 Review of Litigation, 173 (1979).

⁷³ Hodes, *Rethinking the Way Law Is Taught: Can We Improve Lawyer Professionalism by Teaching Hired Guns to Aim Better*, 87 Ky. L. J. 1019 (1999).

work. Even Gorgias, for all his power of rhetoric, could not convincingly assert both of these claims. Nor can we. . . .⁷⁴

12. The Not So Subtle Art of Misdirection

Whether the articulated standard is that lawyers “must use any legally available move or procedure helpful to a client’s bargaining position,”⁷⁵ an “almost pathological pro-client attitude,”⁷⁶ or “‘total annihilation’ of the other side,”⁷⁷ or other, less pejorative phrases, “effective” negotiation often means winning big, and this often involves, to use a kind euphemism, “misdirection.” “Misdirection” can include either a true but incomplete statement of facts or silence, both of which are designed to lead the other party to an erroneous conclusion about the facts or your true position. The excuse for this behavior (“I didn’t lie”), according to Professor Wetlaufer, can be categorized as follows:

“[L]awyers sometimes assert that whatever they did was not a lie. These claims are of at least five kinds: (1) ‘I didn’t lie because I didn’t engage in the requisite act or omission’; (2) ‘I didn’t *mean* to do anything that can be described as lying’; (3) ‘I didn’t lie because what I said was, in some way, literally true’; (4) ‘I can’t have lied because I was speaking on some subject about which there is no ‘truth’; and (5) ‘I didn’t lie, I merely put matters in their best light.’”⁷⁸

Other categories where a “lie” or “mistruth” has been stated, according to Wetlaufer, fall into the following groups:

1. I lied, if you insist on calling it that, but it was an omission of a kind that is presumed to be ethically permissible.
2. I lied but it was legal.
3. I lied but it was on an ethically permissible subject.
4. I lied but it had little or no effect.
5. I lied but it was justified by the nature of the negotiations.
6. Lying is within the rules of the game.
7. I lied but it was justified by my relationship to the victim.

As Professor Wetlaufer has written:

“. . . A lie about a negotiator’s authority is told with the same purpose and with the same effect as a lie about the true mileage of a used car. The speaker’s hope is that, by creating some belief at vari-

⁷⁴ Wetlaufer, *Lying in Negotiations*, 75 Iowa L.Rev. at 1272.

⁷⁵ Robert J. Condlin, *Bargaining in the Dark: The Normative Incoherence of Lawyer Dispute Bargaining Role*, 51:1 Maryland L.Rev. 1, 71.

⁷⁶ Lawry, *The Central Moral Tradition of Lawyering*, 19 Hofstra L.Rev. 311, 330.

⁷⁷ Lawry, *Central Moral Tradition* at 331.

⁷⁸ Wetlaufer, *Lying in Negotiations* at 1237.

ance with her own, she will get a better deal than she could have gotten without having created that belief. The advantages she may hope to secure through these lies are every bit as tangible, every bit as great, and every bit as illegitimate as those she might hope to secure through lies on other subjects. So is the damage that will be caused." Wetlaufer, *Lying in Negotiations* at 1242, 1243.

Whether one calls it "misdirection," "puffing," "bluffing," or some other term, one need not resort to biblical injunctions to find a discussion of whether absolute truthfulness is always desirable.⁷⁹ Thus, the Talmud admonishes one to refrain from all varieties of dealings which depend upon obtaining a false value for things, or placing a false value on things. More importantly, one should not take advantage of the weakness of another, either by raising false hopes or by making tactless remarks. The Greeks and Romans wrote much on this subject.

Homer wrote, in the *Iliad*, "For hateful in my eyes, even as the gates of Hades, is that man who hides one thing in his mind but says another."⁸⁰

Aeschylus had Prometheus say: "The worst disease of all, I say, is fabricated speeches and disguise."⁸¹

Cicero, in his letters to his son, describes a system of moral rectitude:

"But the most luxuriantly fertile field of all is that of our moral obligations - since, if we clearly understand these, we have mastered the rules for leading a good and consistent life.

⁷⁹ The Talmud, a 20-volume rabbinic exegesis on the Torah (the first five books of the Bible) dating from the third century, contains numerous comments and explanations of biblical language. Note: All the quotations and materials in this footnote are from *Studies in Shemot*, Book 2, by Nehama Leibowitz.

The Bible contains a rule of fair dealing in pricing. Leviticus 25:1-17 deals with the concept of the Sabbatical Year and the Jubilee Year. Every seventh year the soil was to be untilled (the Sabbatical Year). Every 50th year the land was to lie fallow and all landed property was to revert to the original owners. During 49 of the years the land could be leased or sold, but during the 50th year it returned to the original owner. Obviously, the closer one got to the Jubilee Year, the less valuable the rights of the possessor/buyer/lessee. Likewise, the further from the Jubilee Year, the more the owner could get for the land. Leviticus 25:14-17 specifically requires that the price reflect the fair value of the land in relation to the Jubilee Year. As Leibowitz notes:

[T]he Torah is not concerned with exclusively protecting the interests of the purchaser to save him from exploitation, or those of the vendor, who has been forced by his straitened circumstances to sell his ancestral field. But both parties are equally admonished to abide by the principles of justice and honesty, which alone should reign in the world and which should not be crowded out by man's selfish greed.

⁸⁰ *Iliad*, Chapter 9.

⁸¹ Aeschylus, *Prometheus Bound*, Translation by Paul Roche, Mentor Classics (1962-1964).

* * *

The most thorough analysis of moral obligations is unquestionably that of Panaetius, and on the whole, with certain modifications, I have followed him. The questions relating to this topic which arouse most discussion and inquiry are classified by Panaetius under three headings:

1. Is a thing morally right or wrong?
2. Is it advantageous or disadvantageous?
3. If apparent right and apparent advantage clash, what is to be the basis for our choice between them?

* * *

So let us regard this as settled: what is morally wrong can never be advantageous, even when it enables you to make some gain that you believe to be to your advantage. The mere act of believing that some wrongful course of action constitutes an advantage is pernicious.”⁸²

Cicero wrote about situations involving hard bargaining in business and sharp practices in the law. Among Cicero's examples was that of a merchant from Alexandria who brought a large stock of corn to Rhodes, which was in the midst of a famine. The merchant was aware that other traders were on their way from Alexandria with substantial cargoes of grain. The dilemma for the merchant farmer was whether he should tell the Rhodians this and get a lesser price, or say nothing and get a higher price. Cicero also posits the example of an honest man who wants to sell a house knowing that it contains certain defects of which he alone is aware. Should the seller reveal the defects and perhaps not sell the house at all or for a lesser price, or should he conceal them?

Cicero points out, using Antipater and Diogenes as two poles of the argument, that one position is to take a moral view and reveal everything while the other is that one should do only what is commercially advantageous. Cicero's own view is that one should not conceal any defects:

I believe, then, that the corn-merchant ought not to have concealed the facts from the Rhodians; and the man who was selling the house should not have withheld its defects from the purchaser. Holding things back does not always amount to concealment; but it does when you want people, for your own profit, to be kept in the dark about something which you know would be useful for them to know. Anyone can see the sort of concealment that this amounts to - and the sort of person who practices it. He is the reverse of open, straight forward, fair and honest: he is a shift, deep, artful, treacherous, malevolent, underhand, sly, habitual rogue. Surely one does

⁸² Cicero, *Selected Works*, Translated by Michael Grant, Penguin Books, Copyright (1960), page 177.

not derive advantage from earning all those names and many more besides.⁸³

Cicero traces the requirement of honesty and fair dealings to the Twelve Tables, the earliest and most fundamental of Roman laws, circa 450 B.C., and to the Plaetorian law, circa 192 B.C. Pointing out that honesty and fair dealing are appropriate criteria, Cicero notes that “the laws in our Civil Code relating to real property stipulate that in a sale any defects known to the seller have to be declared.” A suppression of facts not asked about was impermissible. Cicero writes that although the civil law does not rectify all moral wrongs, there is nobility in the following formulas:

“That I not be deceived and defrauded because of you and because of trust in you. And that other golden phrase: between honest men there must be honest dealing and no deception.”⁸⁴

Cicero then discusses what is honest dealing. This Roman view of the law was adopted by the French in their Civil Code. Robert Pothier, the great French jurist, stated:

“Good faith obliges the seller not only to refrain from suppressing the intrinsic faults of what he sells, but universally from concealing anything concerning it, which might possibly induce the buyer not to buy it all, or not to buy at so high a price.”⁸⁵

Although civilian jurisdictions (such as Louisiana) have long since honored truth in negotiations, even enshrining these concepts in their Civil Codes, the common law took the opposite approach, postulating the rule of caveat emptor as opposed to the civilian concept of *caveat venditor*.⁸⁶

In *Laidlaw v. Organ*, a famous common law case, Chief Justice Marshall rejected the concept of honesty and fair dealings when facts are

⁸³ Cicero, *Selected Works*, Grant Translation, at 178-179.

⁸⁴ Cicero, *Selected Works*, Grant Translation, at 185.

⁸⁵ R. Pothier, *Traite Du Contrat de Vente*, 2 OEUBRES de Pothier 106 (M. Dupin. Ed. 1823), translated by Professor Shael Herman in “The Louisiana Civil Code, A European Legacy for the United States,” Louisiana Bar Foundation (1993) at 42.

⁸⁶ Common law precepts are not subject to universal approbation. Litigators who had the distinction of arguing a case before the late, esteemed Judge John Minor Wisdom of the United States Court of Appeals for the Fifth Circuit, and who have attempted to wax eloquent about the majesty of the Anglo-Saxon common law, sometimes elicited a quick response from Judge Wisdom. He liked to paraphrase Disraeli’s famous statement to Parliament. Judge Wisdom was wont to look down at counsel from the Bench and proclaim:

Counselor, when the Angles and Saxons were howling savages, painted blue and eking out an existence fishing on the fens of England, there was a civil law system of justice for more than 1,000 years on the Continent of Europe from which Louisiana derived its Civil Code.

“equally accessible to both parties.”⁸⁷ The buyer, Organ, sought to compel delivery of tobacco that he had purchased. Laidlaw, the seller, claimed that he was deceived by Organ and did not have to deliver the tobacco. Laidlaw had asked whether Organ knew of anything that might affect the tobacco's value and Organ said nothing. In fact, Organ knew that the price of tobacco had risen steeply because the Treaty of Ghent had been signed, ending the War of 1812. Organ, the buyer, won because there was no obligation, said Justice Marshall, to speak. Remaining silent was permissible,⁸⁸ even though Organ knew that Laidlaw was under a misapprehension.⁸⁹

It is this type of outcome, where sharp bargaining on behalf of one party obtains an advantage that would not otherwise be there but for the silence or for the misdirection, that leads to “the sense of injustice.”⁹⁰ Professor Edmond Cahn's famous book by this title argues for a philosophy that restores a sense of justice and avoids a sense of injustice in the law.

“Nevertheless, philosophers have long held the opposing opinion: that justice or righteousness is the source, the substance, and the ultimate end of law. Such a doctrine was announced at least as early as the Book of Leviticus and the masterpieces of the Athenian enlightenment. It developed under the influence of the Stoics through the centuries of decadence in the Roman republic and early empire, assumed a pseudo-Christian guise by the time of Justinian's *Corpus Juris*, flourished amid the brutalities of medieval Europe, and became, in the skillful hands of Thomas Aquinas, an authentic tenet of theology.”⁹¹

13. Non-Litigation Negotiations and Liability to Third Parties

Although the vast bulk of negotiations take place outside of a litigation context, the rules (if any) that regulate negotiations are determined primarily by judicial decisions that, of necessity, occur after litigation. There are few reported ABA advisory opinions on the ethics of non-litigation negotiations.⁹² The American Law Institute has completed the

⁸⁷ *Laidlaw v. Organ*, 15 U.S. (2 Wheaton) 178, 179 (1817).

⁸⁸ In fact, the brief of the buyer contended: “The maxim of *caveat emptor* could never have crept into the law if the province of ethics had been co-extensive with it.” 2 Wheat at 193.

⁸⁹ For a critique of this view, see Professor Shael Herman's discussion in “The Louisiana Civil Code, A European Legacy for the United States,” (Louisiana Bar Foundation 1993) at 42-43.

⁹⁰ Cahn, *The Sense of Injustice*, Indiana University Press (1964), Midland Book Edition.

⁹¹ Cahn, *The Sense of Injustice*, Indiana University Press (1964), Midland Book Edition.

⁹² See ABA Inf. Opinion 86-1518 (1986). For a state opinion, see N.Y. County Law-

Restatement of Law Governing Lawyers. The Restatement goes beyond the Model Code and the Model Rules in some respects and allows for discipline in negotiations even though the conduct may not be civilly actionable. "Puffing" would still be allowed in some instances. The Restatement addresses issues the ABA Code and Rules do not, and if applied by courts will substantially narrow the gap between permissible tactics in general negotiations and those not allowed in the litigation context. The ABA's "Ethics 2000" effort also attempts to confront this issue.⁹³

When it comes time for a court to rule on the limits of ethical behavior of lawyers, the court's view often may be colored by the separate statutory and jurisprudentially evolved standards that control an attorney's duty to the court and to the judge. In making such rulings, however, seldom do courts explicitly discuss the differences between the professional rules that relate to negotiations as opposed to court-related principles.

Analogies to the need to have truthful, fair dealing can be found in securities litigation. There, a separate body of law regulates what are "material facts" and "material omissions." Professionals can be "aiders and abettors" in securities fraud cases.

Even in the securities field, where the liability is statutory, courts have differing views on whether obligations to the public outweigh obligations to clients or to a corporation. A famous example is the *Dirks* case.⁹⁴ The federal court of appeals had held that *Dirks*, a respected financial analyst, was properly disciplined for failing to disclose to both the S.E.C. and the public information concerning a company's creation of false policies and records. The fact that the financial analyst attempted to get the *Wall Street Journal* to publish a story about the issue did not cleanse the failure to disclose the information to the S.E.C. or the public.⁹⁵ Reversing the appellate court decision, the Supreme Court held that

yers' Association Committee on Professional Ethics Op. No. 686 (1991) on the responsibilities of a lawyer who discovers that his client may have given materially inaccurate information to the other side; cited in Tentative ALI Draft #9, Restatement of Law Governing Lawyers.

⁹³ More on the ABA's efforts can be found at <http://www.abanet.org/cpr/ethics2k.html>. A copy of the ABA's March 23, 1999 draft is attached as an appendix to this article.

⁹⁴ *Dirks v. Securities and Exchange Commission*, 681 F.2d 824 (D.C.Cir. 1982), reversed *sub nom. Dirks v. S.E.C.*, 463 U.S. 646, 103 S.Ct. 3255, 77 L.Ed.2d 911 (1983).

⁹⁵ *Dirks* also acted knowingly when he passed on his information to clients before going to the SEC, in violation of his duty to the public and the SEC and in violation of his informants' disclose-or-refrain obligations. Therefore, it is not precisely relevant whether *Dirks* subjectively "knew" that his clients would trade. He knowingly took improper actions and put parties who were reasonably likely to trade without disclosure in a position to do so.

Dirks (as a tippee of a tippee) had no duty to disclose. Because there was no breach of duty to shareholders by insiders, “there was no derivative breach by Dirks.”⁹⁶ The dissent would have found Dirks liable, claiming that an inquiry into motives was not necessary.⁹⁷ Although the motives may have been “laudable, the means he chose were not. * * * As a citizen, Dirks had at least an *ethical obligation* to report the information to the proper authorities.”⁹⁸ If the courts have difficulty in delineating ethical duties in the highly regulated securities field, then it is not unusual that the regulation of ethics in general negotiations is said by some to be even more troublesome.

One commentator has even asserted that lawyers can “misrepresent” some issues with impunity:

“Almost all negotiators expect opponents to engage in “puffing” and “embellishment.” Advocates who hope to obtain \$50,000 settlements may initially insist upon \$150,000 or even \$200,000. *They may also embellish the pain experienced by their client, so long as their exaggerations do not transcend the bounds of expected propriety.* * * *

“It is thus ethical for legal negotiators to misrepresent the value their client places on particular items. For example, attorneys representing one spouse involved in a marital dissolution may indicate that their client wants joint custody of the children, when in reality he or she does not. Lawyers representing a party attempting to purchase a particular company may understate their client's belief regarding the value of the goodwill associated with the target firm. So long as the statement conveys their side's belief — and does not falsely indicate the view of an outside expert, such as an accountant — no Rule 4.1 violation would occur.

Legal negotiators may also misrepresent client settlement intentions. They may ethically suggest to opposing counsel that an outstanding offer is unacceptable, even though they know the proposed terms would be accepted if no additional concessions could be generated.”⁹⁹

The record thus amply supports the SEC's finding that Dirks acted with requisite scienter for aiding or abetting liability under Rule 10b-5. 681 F.2d at 846.

⁹⁶ 463 U.S. at 667, 103 S.Ct. at 3268.

⁹⁷ Dissent of Justice Blackmun, joined by Justices Brennan and Marshall, 463 U.S. at 674, 103 S.Ct. at 3271.

⁹⁸ Emphasis supplied; 463 U.S. at 678, 103 S.Ct. at 3273.

⁹⁹ Craver, “Negotiation Ethics: How to Be Deceptive Without Being Dishonest: How To be Assertive Without Being Offensive,” 38 S. Tex. L. Rev. 713, 726 (1997).

There are cases that deal with negotiations in non-litigation transactions. Most involve alleged fraud by a seller or lender and the lawyer's liability, particularly if there was but one lawyer handling all aspects of the closing for the lender, buyer, and seller.¹⁰⁰ These cases usually involve claims of self-dealing or mixed representation.

In New Jersey, *Baldasarre v. Butler*¹⁰¹ has provided a cautionary note for all attorneys who attempt to represent both buyer and seller. There, even though the attorney attempted to obtain written consents from both the buyer and seller, the attorney found himself in an untenable conflict when the buyer attempted to “flip” the property to a third party while continuing to negotiate for extensions on the closing with the seller. What is intriguing about the case, however, is not only the conflict-of-interest issue, but also an unspoken issue – consider what would have happened had the attorney represented *only* the buyer. As the Court noted, the problem in the case was the dual representation by the attorney; the Court found no duty by the buyer to inform the seller that the buyer was going to obtain a great profit by executing an assignment or sale of his rights once the sale with the seller was closed. In fact, the Court found that the buyer “had no duty to disclose”¹⁰² his intended use or profit – in other words, the buyer could deceive the seller and refuse to give truthful information. Thus, theoretically, an independent attorney for the buyer would likewise have been under no compunction to reveal the potential “flip” of the property and would not have violated the New Jersey Rules of Professional Conduct in remaining silent, even had the purchaser asked about the buyer’s intended use of the property. Indeed, the Court explicitly noted that the buyer’s silence was perfectly permissible and that the buyer “did no wrong.”¹⁰³

Contrast *Baldasarre v. Butler* with *Petrillo v. Bachenberg*,¹⁰⁴ where there was alleged negligent misrepresentation by a seller’s attorney involving percolation tests on the property. While *Baldasarre* held a lawyer culpable because of a conflict of interest involving two clients on opposite sides of a deal, *Petrillo* determined that the attorney could be liable to a non-client in the furnishing of a percolation test report that was not “complete and accurate” but rather was apparently a composite of two different reports. Notwithstanding the broad rule of *Petrillo*, New Jersey has refused to make a violation of the Rules of Professional Conduct “a basis for civil liability against an adversary’s attorney.” *Baxt v.*

¹⁰⁰ See, *Louisiana State Bar Association v. Klein*, 538 So.2d 559 (La. 1989).

¹⁰¹ 132 N.J. 278, 625 A.2d 458 (1993).

¹⁰² *Id.*, 625 A.2d at 464.

¹⁰³ *Id.*

¹⁰⁴ 263 N.J. Super. 472, 483, 623 A.2d 272 (App. Div. 1993) (same), *aff’d*, 139 N.J. 472, 655 A.2d 1354 (1995).

Liloia, 155 N.J. 190, 197; 714 A.2d 271, 274 (1998).¹⁰⁵ Of course, this does not mean that a violation of the ALI Restatement might not lead to liability.

¹⁰⁵ The Court in *Baxt* stated (155 N.J. 206 *et seq.*, 714 A.2d 279 *et seq.*):

The record before this Court presents an object lesson in unprofessional behavior by experienced and knowledgeable trial lawyers. For a period spanning the course of at least one month, between November and December 1991, defendants Liloia and Sylvester knowingly and deliberately obstructed the discovery process in the Summit foreclosure action by misleading plaintiffs about the source of the signed modification agreement and by refusing to respond candidly to specific requests for direct and accurate information. The sequence of events during which this behavior took place can be briefly described.

In June 1991, the bank produced its credit file for Grove's inspection. At that time the file contained one copy of the modification agreement signed only by bank officer Jennifer Calenda. From July 31 to August 1, 1991, Grove in turn produced documents for the bank's inspection, wherein defendants found and copied an original modification agreement signed by Paul Hartman and witnessed, notarized and signed by Calenda. Subsequently, on September 27, 1991, Summit filed a motion for summary judgment, attaching in support a copy of the executed modification agreement obtained through discovery. Grove opposed Summit's motion and filed a cross-motion to compel depositions, which was granted.

Grove's attorney, by letter dated November 27, 1991, requested that defendants make the "bank's original credit file" available for her use during her scheduled depositions. Presumably this request was not honored at the November 30, 1991 deposition of Scott Witherspoon, a former bank officer, as Grove's attorney renewed her request by letter dated December 1, 1991. Prior to the next scheduled deposition, defendant Liloia instructed Calenda to insert the copy of the agreement signed by Hartman and found in Grove's files into the bank's credit file.

At the December 4, 1991 deposition of Calenda, Grove's attorney attempted to find out whether the bank had ever received an original copy of the modification agreement signed by Paul Hartman. Defendants Liloia and Sylvester promised to investigate whether the bank had received an original or a facsimile only. During the deposition, Grove's attorney also repeated her request for access to the bank's original files. Although it does not appear that she received the files at the deposition, defendant Sylvester did indicate by letter dated December 5, 1991 that "the original files were produced again" for her inspection on December 4.

On December 7, 1991, prior to a second deposition of Witherspoon, Grove's attorney reviewed what Sylvester characterized as "the original bank files" and listed for the record the documents she found, including the copy of the signed modification agreement. In the deposition which followed, the attorney repeatedly requested that defendant Sylvester produce "the document on which [the bank] moved for summary judgment." Even more specifically, she asked Sylvester if "[t]he copy annexed to the motion for summary judgment[] was ... taken from the bank's files?" The following colloquy took place:

Mr. Sylvester: I'm not here to answer questions. I don't know. You know, I'm not going to answer the questions.

Ms. Chaitman: Can you tell me where else it would have been?

Mr. Sylvester: I'm not saying where it was taken from, I'm not here.

Ms. Chaitman: Let me say this. When the documents were produced to us, there was no Mortgage and Note Modification Agreement produced with any signatures on it other than Jennifer's and ... I'm wondering if it came out of

Moreover, note that the *Petrillo* court seemingly made the attorney liable not to a specific purchaser but to *any purchaser* who might reasonably be expected to rely upon the composite report. *Petrillo* even recognized (unlike some legal critics) that lawyers are human: “[i]n many situations, lawyers, like people generally, may not have a duty to act, but when they act, like other people, they should act carefully.”¹⁰⁶ *Petrillo* is a cautionary tale for real estate lawyers who prepare or assist in the preparation of misleading documents, even if the document does not contain a traditional “opinion” or even the lawyer’s signature on it.

The lack of necessity of expert testimony in certain instances was approved in *RTC Mortgage Trust 1994 N-1 v. Fidelity National Title Insurance Company*, 58 F.Supp.2d 503, 524 (D. N.J. 1999), for there are certain matters about a lawyer’s liability, wrote the court, which are “ ‘so basic’ that ‘a layperson’s common knowledge is sufficient to permit a finding that the duty of care has been breached.’ ”¹⁰⁷

14. A Look at Appellate Decisions

While reported Louisiana appellate decisions appear to shy away from actually sanctioning lawyers for a lack of professionalism rather than merely calling into question their conduct, federal courts have not been as reluctant, and there are many reported cases on sanctions.¹⁰⁸

Of course, FRCP 11 provides the possibility for sanctions at the district court level, as does FRAP 38¹⁰⁹ and 46(c)¹¹⁰, while 28 U.S.C. §1927 provides a general policy against those who “unreasonably and vexatiously” multiply litigation. These rules are not the end of the inquiry, for the Supreme Court has held that courts have inherent powers to sanction lawyers and clients (including imposition of costs and fees against the

some file other than produced to us....

Mr. Sylvester: Okay. I’ll take your request under advisement. Let’s proceed.

At this point, if not before, defendants certainly should have disclosed that the modification agreement on which the bank moved for summary judgment was a copy of the agreement in the bank’s files, having been placed there by the defendants after they discovered it among Grove’s papers. This disclosure was not made. (Emphasis supplied).

¹⁰⁶ *Id.* at 1354.

¹⁰⁷ Quoting with approval from *Sommers v. McKinney*, 287 N.J. Super. 1, 10, 670 A.2d 99 (App. Div. 1996).

¹⁰⁸ See, e.g., the cases cited at footnotes 15-19.

¹⁰⁹ “If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.” To the same effect, see 28 U.S.C. §1912.

¹¹⁰ “A court of appeals may discipline an attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with any court rule. First, however, the court must afford the attorney reasonable notice, an opportunity to show cause to the contrary, and, if requested, a hearing.”

clients, and disbarment against lawyers) even for actions that do not violate the rules or statutes.¹¹¹ The rules, however, are a good place to begin.

There are a number of federal circuit cases where appellate courts have addressed the factors to be considered in sanctioning counsel under F.R.A.P. 38. These include:¹¹²

- Filing a *one sentence* brief without any supporting authority or analysis.¹¹³
- Filing a meritless appeal and then defending against sanctions on the grounds that the client with his contract obliged him to take an appeal; further, in taking an appeal after counsel believed it had some merit, counsel “exercised conspicuously bad judgment.”¹¹⁴
- Filing an appeal that “had absolutely no prospect of success and . . . taxed the resources of this Court, the district court, and the defendants.”¹¹⁵
- Making a claim that was “hyper-technical,” that was “totally lacking in support and substance,” and that “was designed to fail” on appeal because the result was foreordained by “clearly established law to the contrary.”¹¹⁶
- Plaintiff’s counsel filing an appeal solely as to the award of attorney’s fees without the client’s consent and proceeding in “conduct throughout the course of this appeal [that] was ill-advised, if not improper.”¹¹⁷

In suspending an attorney from practice, the court *In Re Solerwitz*, 848 F.2d 1573 (Fed. Cir. 1988), *cert. den.* 488 U.S. 1004 (1989) found that an attorney not only had filed a frivolous appeal, but had also failed to follow court rules. The fact that three legal experts testified in his defense did not help the hapless attorney, who had continued to press more than 100 appeals that were deemed frivolous. While the case was, in the court’s own words, “unusual” (*id.* at 1581), the court’s observations, sometimes quoting from the rule to show cause and sometimes quoting from other cases, is worth noting and are set forth in some detail in the following footnote.¹¹⁸

¹¹¹ *Chambers v. Nasco*, 115 L.Ed.2d 27, 501 U.S. 1269, 1112 S.Ct. 12 (1991).

¹¹² For an article on this point, see Maureen Middleton, “Ethical Issues Unique To Appellate Practice,” <http://www.fmglaw.com/artapp.htm>.

¹¹³ *Dungaree Realty, Inc. v. U.S.*, 30 F.3d 122 (Fed. Cir. 1994).

¹¹⁴ *South Star Communications, Inc. v. F.C.C.*, 949 F.2d 450, 452 (D.C. Cir. 1991).

¹¹⁵ *Flexible Mfg. Systems Pty. v. Super Products*, 86 F.3d 96, 101 (7th Cir. 1996).

¹¹⁶ *Perry v. Pogemiller*, 16 F.3d 138, 140 (7th Cir. 1993).

¹¹⁷ *Soliman v. Ebasco Services, Inc.*, 822 F.2d 320, 323 (2nd Cir. 1987).

¹¹⁸ Emphasis has been supplied: “In his briefs in those appeals, 107 of which were

Another case where a court imposed sanctions involved an attempt to disqualify a trial judge on grounds that the U.S. Fifth Circuit deemed “totally without merit; indeed, they are almost laughable. What is not humorous is the attack on the district court and the great waste of judicial time and resources.”¹¹⁹ The Court also took judicial notice of a post-hearing song issued by an attorney on a compact disc, a song that attacked the trial judge. The Fifth Circuit was not amused, for even though some of the lyrics might have been “fairly clever, . . . they were not written by a folksinger or a balladeer. They were penned by a lawyer, an of-

virtually identical, *[The attorney] disregarded Federal Rules of Appellate Procedure and this court's rules, failed to file appendices, provided no citations to the record, ignored authorities cited by the government, advanced numerous arguments on issues not on appeal, and repeatedly raised contentions not raised before the Merit Systems Protection Board. [The attorney's] briefs were devoid of any showing on which the decision appealed from could even possibly be reversed, devoid of any basis on which the precedents of this court could be distinguished in law or fact, and devoid of any effort to make such distinctions, in total disregard of this court's written instructions of December 10, 1984. * * * [The attorney]' conduct in filing and maintaining frivolous appeals having no colorable basis in fact or law has wasted the time and limited resources of this court, has denied availability of the court's resources to deserving litigants, and has constituted flagrant and totally inexcusable abuse of the judicial process. [The attorney]' conduct has been “unbecoming a member of the bar of the court”, Fed.R.App.P. 46(b). * * * Respondent also cited counsel's frequent, repeated, and brazen violations of this court's rules. [The attorney]' reply briefs simply ignored those citations, merely stating that the earlier cases were distinguishable (but citing no distinguishing factors), ignored Respondent's charge that he had failed to cite to the record, and stated that the appeal was filed to give Des Vignes access to the court. Faced with clear and insurmountable indication that all 131 appeals were frivolous, [The attorney] has continued to maintain this and the other 130 appeals. * * * The views of the expert witnesses, while based in part on established tenets of the legal profession, do not fully outline the duties of a lawyer nor do they provide a complete picture of the specific issues before the court in this proceeding. *An attorney's obligations to provide zealous advocacy on behalf of his client are not absolute and uncompromising, but must be viewed in light of his additional obligations as an officer of the court to promote the administration of justice and to comply with the court's rules, notices, and orders. Additionally, as with his obligations to his client, the attorney's obligations to the court are ongoing at every stage of the litigation and the attorney must continually reevaluate the positions advanced in light of both the development of the litigation itself and of the relevant case law affecting the litigation.* * * * [The attorney] further argues, with the support of the expert witnesses, that his failure to comply with the court's rules and orders governing the filing and form of briefs and the filing of appendices was not his responsibility but resulted from the inability of his small law firm to comply with those requirements within the time deadlines. Judge Bennett correctly rejected this contention. He pointed out that “[i]t is difficult to fathom how a 3-person practice, even in ideal circumstances, could adequately ... handle 154 court appeals for 736 individuals, given the relatively short time frame in which all of the actions arose. *If the firm's personnel turnover and shortages were so severe as not to allow compliance with the briefing and record filing requirements of the court, [The attorney] should have referred some of his clients to other firms or taken alternative means to insure adequate representation for them.*”*

¹¹⁹ *Traveler's Insurance Company v. Liljeberg Enterprises, Inc.*, 38 F.3d 1404, 1409 (1994).

ficer of the very court being ridiculed, who had been unsuccessful repeatedly in these actions in that court.”¹²⁰

The Fifth Circuit also has affirmed sanctions against a lawyer who sought to recuse a judge and, when the motion to recuse was denied, filed an appeal “alleging specific actions of impropriety that have no basis in the record.”¹²¹

The Fifth Circuit has not hesitated to impose sanctions under F.R.A.P. 38 when appropriate, but the Court has noted that merely bringing novel procedural issues¹²² or filing an appeal of an issue of first impression for the Court cannot be the basis of either sanctions or the styling of the matter as frivolous.¹²³

When the Fifth Circuit has imposed sanctions, the conduct has tended to be egregious. In *Parker v. Commissioner of Internal Revenue*, 117 F.3d 785, 787 (5th Cir. 1997), sanctions were imposed against *pro se* plaintiffs who made “ridiculous allegations that the Internal Revenue Code is the product of an illegal conspiracy.”

In *Williams v. Phillips Petroleum Company*, 23 F.3d 930 (La. 1994), \$20,000 in attorneys fees plus double taxable costs were cast against the plaintiffs and their counsel for a frivolous appeal. Counsel for the plaintiffs had alleged that the defendant’s lawyer had engaged in improper, *ex parte* contacts with the district judge, the magistrate judge, and with their law clerks. The Court’s language is strong.¹²⁴ “Importantly, the plaintiffs’

¹²⁰ *Id.*

¹²¹ *In Matter of Raspanti*, ___ F.3d ___, No. 06-31252 (5th Cir. 4/14/08).

¹²² *EHM v. Amtrak Board of Directors*, 780 F.2d 516 (5th Cir. 1986).

¹²³ *Estiverne v. Sak’s Fifth Avenue*, 9 F.2d 1171 (5th Cir. 1993).

¹²⁴ “Larry’s legal arguments are also frivolous and independently deserving of sanctions. * * * Larry seeks to mislead this court about the circumstances of the alleged improper contacts. He attempts to prove his conclusion of unethical conduct by Phillips’s counsel by seriously misquoting defendants’ counsel’s time records, omitting important facts from the description of counsel’s activities, and drawing unsupported conclusions. * * * *Serenely undeterred by his lack of success*, Larry has renewed his personal attack against defendants’ counsel in this court.

* * *

“In advancing his claim, Larry has attempted to mislead the court by blatantly misrepresenting the record. * * * We will not stand by idly and allow an attorney to waste the time of this court and maliciously denigrate the reputations of judges and other officers of the court.

“Moreover, Larry has not explained, either in his brief or in his ample opportunity at oral argument, why he has raised this issue at all. He has asked for no remedy, such as overturning the judgment. His only discernible motive is to cast brickbats and to “poison the well” by tattling on his opponent. Such motives hardly justify his baseless allegations and his attempt to lie to this court regarding what is in the record.

“Upon determination that an appeal is frivolous, we “may award just damages and single or double costs to the appellee.” Fed.R.App.P. 38. Larry has attempted to mislead

assertions, made through Larry, are not based upon any reasonable or good-faith reading of applicable law. They are utterly baseless and bizarre.”

The Fifth Circuit has been careful to scrutinize the actions of lawyers who use sanction motions as a tactical device. In *Walker v. City of Bogalusa*, 168 F.3d 237, 241 (5th Cir. 1999), the Court refused to award sanctions because both parties “contributed to the disharmony in the proceedings.” The Court also noted that while Rule 11 does not directly apply to appellate proceedings,¹²⁵ it is “guidance in imposing Rule 38 sanctions.” *Id.*

The Fifth Circuit’s decision in *Coghlan v. Starkey*, 852 F.2d 806 (5th Cir. 1988) on sanctions is also worthy of note, for it discusses the rule applicable to 28 U.S.C. § 1927.¹²⁶ “We accept arguendo that the appeal

this court for no legitimate end. He has wasted the time and energy of opposing counsel and of this court. As a result, we exercise our power to impose sanctions on plaintiffs and their counsel for filing a frivolous appeal.

¹²⁵ *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 406, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990).

¹²⁶ “This is an interlocutory appeal . . . from the district court’s denial of [a] motion for summary judgment ...

“Because there are disputed issues of material fact concerning the qualified immunity defense, we lack jurisdiction to consider the interlocutory appeal. Accordingly, we dismiss. In addition, because counsel for appellant has multiplied these proceedings unreasonably and vexatiously, we impose sanctions against counsel pursuant to 28 U.S.C. § 1927. “ In substance, Johns urges two points on appeal. * * * The first argument is specious, the second is frivolous, and neither merits extended discussion.

“Underlying the sanctions provided in 28 U.S.C. § 1927 is the recognition that frivolous appeals and arguments waste scarce judicial resources and increase legal fees charged to parties. See *Carmon v. Lubrizol Corp.*, 17 F.3d 791, 795 (5th Cir.1994); *Platenburg v. Allstate Ins. Co.*, 918 F.2d 562, 562 (5th Cir.1990). Accordingly, we hold that §1927 sanctions are appropriate in this case against Johns’ attorney because of his arguments to this Court that the Autopsy Report was not properly authenticated when, in truth, (i) the attorney had no reason to doubt the document’s accuracy, (ii) the document was produced to opposing counsel by a witness who was also represented by Johns’ attorney, and (iii) the attorney’s own expert witnesses rely upon a copy of the same Autopsy Report.

“We are mindful that §1927 sanctions should not be assessed without fair notice and without giving the attorney an opportunity to respond. See *Alizadeh v. Safeway Stores, Inc.*, 910 F.2d 234, 236 (5th Cir.1990), citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 762-63, 100 S.Ct. 2455, 2462, 65 L.Ed.2d 488 (1980). However, in their briefing to this Court, plaintiffs strenuously argued that the instant appeal was frivolous. Then, at oral argument, we questioned Johns’ counsel at length about the basis for his arguments concerning the Autopsy Report. Counsel for Johns responded to these issues at oral argument and later in post-argument briefs. We are convinced, therefore, that counsel has received notice that we were considering sanctions against him and has enjoyed sufficient opportunity to respond. See *Coghlan v. Starkey*, 852 F.2d 806 (5th Cir.1988); *Ferguson v. MBank Houston, N.A.*, 808 F.2d 358 (5th Cir.1986) (per curiam).

“We conclude that, pursuant to §28 U.S.C. S 1927, appellant’s attorney should be assessed the attorney’s fees of appellees’ counsel and all costs incurred in this appeal. * *

here was not taken merely to vex the Waterworks District. Nonetheless, the appeal was patently meritless and had as its natural consequence further unwarranted expense and inconvenience for the defendants. Thus, we must consider whether sanctions are necessary . . .”

What if, before a suit is filed, a lawyer in negotiations called the opposing attorneys “stooges and puppets, a weak pussyfooting deadhead who had been dead mentally for ten years”? What if the lawyer accused opposing counsel as demonstrating legal incompetence, using ludicrous additional time and expense to run up the bill on their clients, utilizing their clients as a private piggybank? What if the lawyer called the opposing counsel’s client a hayseed and washed-up has been who surrounded himself in a company of scoundrels?

Do you think that you could turn that lawyer in for a violation of any Rule of Professional Conduct,¹²⁷ or, if you did, that the complaint would be pursued? On the other hand, what would happen if the lawyer made these statements in a deposition or in open court? This situation was litigated in the U.S. Fifth Circuit Court of Appeals. In that case, the appellate court found that such obnoxious and abusive behavior by an attorney in a bankruptcy proceeding warranted a \$25,000 sanction.¹²⁸

* Accordingly, we award reasonable attorneys fees of \$20,643.75 and costs to the appellees’ counsel.” *Baulch v. Johns*, 70 F.3d 813, 818 (5th Cir. 1995).

* * * * *

“An appeal is frivolous if the result is obvious or the arguments of error are wholly without merit. *See, e.g., Atwood v. Union Carbide Corp.*, 847 F.2d 278, (5th Cir.1988) (partial attorneys’ fees for frivolous appeal). Appeal here was patently frivolous, even if the original suit, arguendo, was not entirely devoid of colorable merit. * * * This appeal was taken “in the face of clear, unambiguous, dispositive holdings of this and other appellate courts.” *Capps v. Eggers*, 782 F.2d 1341, 1343 (5th Cir.1986). *See McDougal v. Comm’r*, 818 F.2d 453, 455 (5th Cir.1987) (“[Appellant’s claims] were advanced in the teeth of firmly established rules of law for which there is no arguably reasonable expectation of reversal or favorable modification.”); *Stelly v. Comm’r* (where the baselessness of the challenge had been fully elaborated by both the IRS and the Tax Court, the pro se plaintiffs understood the legal issues and were subject to sanctions); *Cummings v. United States*, 648 F.2d 289 (5th Cir. Unit A Jun. 1981) (sanctions for frivolous appeal where subject-matter jurisdiction patently lacking).

¹²⁷ Being nasty doesn’t appear to fall strictly under the strictures of the eight categories of Rule 8.4, “Misconduct.”

¹²⁸ *In the Matter of First City Bancorporation of Texas, Inc.*, 282 F.3d 864 (5th Cir. 2002). The court stated:

[The lawyer’s] obnoxious behavior, however, was not limited to . . . [the] deposition. Some of the other statements made by [the attorney] during the bankruptcy proceeding . . . are the following:

He characterized other attorneys, including an Assistant United States Attorney, as (1) a “stooge”; (2) a “puppet”; (3) a “weak pussyfooting ‘deadhead’ “ who “had been ‘dead’ mentally for ten years”; (4) “various incompetents”; (5) “inept”; (6) “clunks”; (7) “falling all over themselves, and wasting endless hours”; (8) “a bunch of starving slobs”; and (6) an “underling who graduated

Even in cases where sanctions have not been imposed, the 5th Circuit has not hesitated to express its displeasure: “On the spectrum of disingenuous theories of defense, we view those advanced [by the defendants] as lying somewhere between the wholly specious and the downright frivolous.”¹²⁹

U.S. Fifth Circuit opinions have even criticized lawyers for unprofessional actions during oral argument, including noting a lawyer’s “cavalier disregard for his client’s interest and for his obligations to the Court” in a way that “was both troubling and disgraceful.”¹³⁰

from a 29th-tier law school.” He called the chairman of First City a “hayseed” and a “washed-up has been,” and he also called other First City directors “scoundrels.” He referred to one law firm . . . as “stooges” of another law firm . . . He referred to the work of other attorneys as “garbage” that demonstrated “legal incompetence” while involving “ludicrous additional time and expense.” He asserted that [one law firm] was using First City as a “private piggybank.” * * *

The bankruptcy court found that [the attorney’s] “egregious, obnoxious, and insulting behavior . . . constituted an unwarranted imposition upon and an affront to [the bankruptcy court] and the parties and practitioners who have appeared in this bankruptcy that should not have to be endured in the future.” Accordingly, the bankruptcy court imposed a monetary sanction * * *

[The attorney] does not dispute the factual basis of the bankruptcy court’s sanction order. He thus concedes that he made the myriad rude and insulting comments outlined above. [He] defends his comments in two ways. First, he argues that the statements he made were, for the most part, correct. We find this argument utterly meritless. [The attorney] was never engaged in stating plain facts—he was engaged in hurling gratuitous and hyperbolic insults. Second, [the attorney] argues that the actions of both the court and the opposing attorneys caused his abusive conduct. Obviously, any error on the part of the court or motive on the part of opposing attorneys in filing the sanction motion did not give [him] carte blanche to launch personal attacks and to defy the court’s directive to cease his wholly unprofessional conduct.

¹²⁹ *Federal Insurance Co. v. CompUSA, Inc. and James F. Halpern*, 319 F.3d 746 (5th Cir. 2003).

¹³⁰ *Hartz v. Administrators of the Tulane Educational fund*, ___ F.3d ___, No. 07-30506 (5th Cir. 4/16/08). The Court quoted a portion of the transcript of oral argument to illustrate its point:

“Judge: What do you do about *Morgan*? [A U.S. Supreme court case directly on point].

Phipps: I don’t, I don’t, I don’t know *Morgan*, Your Honor.

Judge: You don’t know *Morgan*?

Phipps: Nope.

Judge: You haven’t read it?

Phipps: I try not to read that many cases, your Honor.

* * *

Judge: I must say, *Morgan* is a case that is directly relevant to this case. And for you representing the Plaintiff to get up here – it’s a Supreme Court case – and say you haven’t read it. Where did they teach you that?

15. What About Federal District Courts?

It is beyond the scope of this paper to look at the constantly evolving and seemingly limitless area of Rule 11 jurisprudence. There are literally hundreds of publications and articles that track this field.¹³¹ Suffice it to say that federal district courts have not been hesitant to use either the threat of sanctions or actual sanctions to control egregious behavior, while at the same time casting a dim eye on a counsel's attempts to use sanctions as litigation tactics.

16. Family Law Negotiations

In one of the few reported cases involving pre-litigation negotiations that do not involve securities or a sale of property nor a writing by a lawyer who was alleged to have acted wrongfully is *Stare v. Tate*.¹³² Arising out of a property settlement in a divorce case, the wife's attorney, through a series of negotiations, offered a property settlement with a serious mistake in the valuation of the property; the mistake was to the wife's detriment. The husband's attorney was aware of the mistake and counter offered using the same mistaken valuation number. The counter offer was accepted by the wife's attorney and the instrument reflecting the counter offer was later approved by a court as a property settlement. After the divorce became final, the former husband, apparently seeking to rub salt in the wound, sent the former wife a copy of the mistaken valuation with a notation on it, "Please note \$100,000.00 mistake in your figures." After receiving the note the former wife filed suit to revoke the property settlement. The court allowed the property settlement to be revoked on the notion of unilateral mistake. Underlying the court's holding, although not explicit, is the implication that the former husband's attorney, who had knowledge of the mistake by making the counter offer, had the duty to inform his opposing counsel of the mistake in valuation.

Arguably the husband's lawyer's behavior did not fall within the prohibition of Rule 4.1, which only prohibits making a "false statement of material facts." While the Comment to Rule 4.1 states that a misrepresentation can occur "if a lawyer incorporates or affirms a statement of another that the lawyer knows is false," the valuation arguably was not

Phipps: They didn't teach me much, Your Honor."

¹³¹ See, e.g., Joseph, G.P., "Recent Decisions: Rule 11, Inherent Power, 28 U.S.C. § 1927," American Law Institute - American Bar Association Continuing Legal Education June 6-7, 2002 21st Century Litigation, SG103 ALI-ABA 293; also see SE63 ALI-ABA 79; 6 Fed. Litigator 155 (2002), "Remedies Unfiled Document May Lead to Rule 11 Sanctions"; Gerber, Robert, "Bringing and Resisting Rule 11 Sanctions," 47 AmJur Trials 521; Butler, M. "Rule 11 Sanctions and a Lawyer's Failure to Conduct Competent Legal Research," 29 Cap. U. L. Rev. 681 (2002); "Sanctions -- Rule 11 -- 'Safe Harbor'" 11 Fed. Litigator 287 (2001); Soocher, S., "Rule 11 Sanctions in 'Lion Sleeps' Case " 3 Ent. L. & Fin. 1 (2000).

¹³² 21 Cal. App. 3d 432, 98 Cal. Rptr. 264 (Cal. App. 2d 1971).

false, simply mistakenly low. Would a bar association discipline the husband's lawyer in this instance? Would there be endless arguments whether the valuation was "false" and whether the husband's lawyer made a "statement" or merely remained silent. Was the statement "material?" Is this the type of problem that Justice Marshall would have no problem disposing of as in *Laidlaw v. Organ*, holding that the information is equally available to both sides?

17. Non-Louisiana Bar Disciplinary Proceedings Involving Negotiations

While there are a few Louisiana cases involving discipline of lawyers for tactics in negotiations,¹³³ nationwide cases where ethics of non-litigation negotiations were the subject of state bar association disciplinary proceedings are few and far between.

An interesting proceeding is *Commission on Legal Ethics v. Printz*, 416 S.E.2d 720 (W. Va. 1992), in which the state Supreme Court dismissed charges against an attorney for whom the bar had recommended public discipline. The attorney handled negotiations between his father and the father's employee, who embezzled over \$300,000.00 from the company. Originally, the employee agreed to cooperate, to work for the company until it was sold, and to help find the missing funds. The embezzler's father was then called to a meeting whose purpose "unquestionably was to determine if [the father] would cover the losses caused by the son."¹³⁴ Afterwards, the lawyer sent the embezzler a "final demand" letter giving him a choice between a "strict financial arrangement" for repayment of the embezzled money or criminal prosecution." Only after the negotiations broke down was the son turned over to authorities and later convicted. The court found no problem with the attorney's action. There was no violation of West Virginia law.¹³⁵ Likewise, no violation of Disciplinary Rule 7-105(A) was found, and the court noted this rule was not brought forward into the Rules of Professional Conduct. Although its sanctions applied to the conduct of the attorney at the time, Disciplinary Rule 7-105(A), which prohibits a lawyer from

¹³³ See, e.g., *In re: Frank*, 04-0238 (La.6/25/04), 876 So.2d 57, where a lawyer was disbarred for (among many other things) having "made misrepresentations during settlement negotiations." This language of *Frank* has been cited a number of times, including by *In re Turissini*, 2006-0172 (La. 4/24/06), 927 So.2d 1105, 1119.

¹³⁴ *Commission on Legal Ethics v. Printz*, 416 S.E.2d at 722.

¹³⁵ Although a West Virginia statute prohibited a victim of a crime from seeking restitution in lieu of criminal prosecution, the court found this statute "void under the Doctrine of Desuetude," 416 S.E.2d 720 and 727. The Doctrine of Desuetude is based upon the concept of an old law so out of use that it would be unfair to apply it today. It is interesting to note that in ruling on Desuetude, the court quoted from *Pryor v. Gainer*, 177 W.Va. 218, 225, 351 S.E.2d 404, 411 (1986), which itself cited the applicable principle "found in Book 10 of the Digest of Justinian." Of course, the Justinian Code was one of the foundations of the civil law.

threatening to present criminal charges only to obtain an advantage in civil matters, was found by the court to be “unworkable.” The court quoted from Professors Hazard and Hodes’ book, *The Law of Lawyering, A Handbook On The Model Rules Of Professional Conduct*,¹³⁶ that one of the reasons that Disciplinary Rule 7-105(A) was omitted from the Model Rules was because the standards “were overbroad, because they prohibit *legitimate* pressure tactics and negotiation strategies.” (emphasis supplied). Obviously, the West Virginia Supreme Court has a high regard for “legitimate pressure tactics and negotiation strategies.” The court did not even address the question of whether the lawyer had an ethical duty to turn the embezzler over once the embezzlement was discovered, particularly since the attorney had no attorney-client relationship with the embezzler, but, rather, with the corporation which was itself defrauded. Why should the attorney’s desire to have the corporation made whole allow the attorney to remain silent and refuse to turn over to the law an admitted felon? Certainly, such a rule would not apply had the corporation been a national bank, because there are specific rules that require disclosure of employee-committed crimes to the pertinent authorities.

New Jersey has disbarred lawyers who commit fraud in negotiations. *Matter of Silverman*,¹³⁷ involved a lawyer who had put together improper financial statements in an attempt to obtain financing for himself and his client and even had “acquiesced in [the client’s] forger of [the client’s] wife’s signature on the . . . loan guarantee.”¹³⁸ Yet, as is

¹³⁶ Section 4.4:103 (Prentice Hall Law & Business 1990).

¹³⁷ 113 N.J. 193, 549 A.2d 1225 (1988).

¹³⁸ *Id.* at 210, 211:

Our independent review of the facts admits of no conclusion other than that respondent committed numerous ethical transgressions, demonstrated by clear and convincing evidence in the record. In his zeal to obtain adequate financing to consummate the acquisition of HLW, respondent prepared various statements and documents containing knowing misrepresentations of highly material facts. For example, in the prospectus, containing both his and Ferber’s financial statements, and on the Liberty Loan application, respondent exaggerated or created non-existent assets and ignored or understated significant liabilities. Respondent altered the net income figure of the Kaufman 1978 HLW financial statement and, along with the prospectus, submitted it to the Weir group; respondent also altered, without Ferber’s knowledge, a key figure on the closing memorandum agreement dictated by Robertson.

Further, several misrepresentations were effected by omissions on respondent’s part: (1) in his June Twelfth letter to Waters respondent enclosed the Liberty commitment letter without disclosing that it had been revoked; (2) at the closing respondent signed the Robertson memorandum, which stated inter alia that there had been no material adverse change in HLW’s financial condition since the first of the year, but failed to reveal that he had executed an agreement with Waters acknowledging the alleged existence of such adverse change; and (3) respondent withheld from Ferber and Robertson many of the details concerning side agreements he had made with Mento, Weir, and others that affected the stability of HLW. Respondent also acquiesced in Ferber’s forgery of his wife’s signature on the Manufacturers

shown by the language in *Baldassarre*, actions short of fraud have not been heavily scrutinized when the lawyer is seen as assisting the client within the scope of the Model Rules, even if a third party is harmed. Whether that result will be the same in the future remains to be seen.

18. Tax Issues

In *Largen v. U.S.*, 1995 WL 556621 (M.D. Fla. 1995), 76 A.F.T.R.2ds 95-5815, the IRS won a case on summary judgment when the taxpayers asserted that they had been coerced into a settlement. Although the Court found that the IRS behavior was blatant enough for the taxpayers to have stated a claim, the claim was barred because the taxpayers engaged in “misleading silence” during the settlement negotiations. Excerpts from the case appear in the following footnote.¹³⁹ “While

Hanover loan guarantee.

¹³⁹ “In 1982, Dr. Largen and Dr. Clontz attended a seminar at which International Capital Management (hereinafter ICM), a licensee of United States Tax Planning Service, promoted investment packages. After the meeting, they met with Dr. Vincent Cremata, a physician-turned-financial advisor who worked for ICM. Through Dr. Cremata, Dr. Largen and Dr. Clontz, both individually and through Largen & Clontz, invested in additional malpractice insurance, commodities, and several other ventures. Dr. Largen later said he felt secure investing with Dr. Cremata because he believed that Dr. Cremata, as a “fellow physician,” would be honest and ethical. Thereafter, Dr. and Mrs. Largen and Dr. and Mrs. Clontz took personal income tax deductions for business losses related to the investments for tax years 1982 and 1983. Dr. and Mrs. Largen later carried investment tax credits back to 1979 and 1980; Dr. and Mrs. Clontz carried credits back to 1979, 1980, and 1981. Largen & Clontz deducted insurance expenses and financial planning expenses from its corporate tax liability for fiscal years ending in 1982, 1983, and 1984.

In March 1984, Special Agents Hawkins and Hood of the Internal Revenue Service (hereinafter IRS) went to Dr. and Mrs. Clontz’s residence, intending to speak to Dr. Clontz. When Mrs. Clontz informed them that her husband was on the golf course, not at home, Special Agent Hawkins insisted that she call him. She reached Dr. Clontz by telephone and Special Agent Hawkins told him that they would have to meet to discuss potential criminal income tax evasion charges. Dr. Clontz told Special Agent Hawkins that he would be available at his office the next day. During the entire encounter, Special Agent Hood played with the Clontz family dog in the kitchen in a friendly manner.

On the following day, Special Agents Hawkins and Hood went to Largen & Clontz’s business office to inform the doctors that they were viewed as suspects in a criminal tax evasion scheme. Dr. Clontz, who met with Special Agent Hawkins alone because Dr. Largen was in surgery, alleges that Special Agent Hawkins called him a “common criminal and insinuated that his intentions were to put [Dr. Clontz] in jail forthwith.” Special Agent Hawkins read Dr. Clontz his Miranda rights, at which point Dr. Clontz stated that he wished to speak to an attorney. Upon Dr. Clontz’s invocation of his right to counsel, Special Agents Hawkins and Hood left the offices. Neither Dr. Clontz or Mrs. Clontz had any further personal contact with IRS agents.

Soon after the agents left, Dr. Clontz telephoned Dr. Largen to discuss what had transpired. Together they decided to retain counsel and, therefore, contacted John Robertson (hereinafter Mr. Robertson), who represented them before the IRS and U.S. Attorney in criminal tax matters from that point forward. Mr. Robertson engaged the services of Paulette Smith, CPA (hereinafter Ms. Smith) to facilitate his representation. Ms. Smith performed accounting work and, along with Mr. Robertson, interacted with the IRS on

Plaintiffs' behalf.

* * *

Although Dr. Largen and Dr. Clontz were apparent targets of the grand jury investigation, they were never indicted. * * * In November 1988, after the criminal investigation of the doctors was finished, the IRS began civil examination of their tax returns. * * * On August 11, 1989, Plaintiffs' claims for deductions . . . were denied at the conclusion of the audit.

Plaintiffs appealed the denial of deductions administratively. * * * Thereafter, Ms. Moreau and Ms. Smith began informal settlement negotiations to reach a mutually acceptable resolution of the tax issues. Ms. Smith alleges that Ms. Moreau proposed a settlement agreement which she said Plaintiffs would have to accept to avoid civil fraud penalties being reinstated in full. The settlement was to be memorialized upon a Form 870-AD, which provides on the reverse, among other terms, * * * Mr. Robertson advised Dr. Largen and Dr. Clontz that the IRS was trying to reach an informal settlement in order to forestall a challenge in district court. Mr. Robertson stated that he had previously told the doctors that they could refuse to pay the taxes on the disallowed deductions and challenge the IRS decision in the United States Tax Court or pay the taxes and challenge the decision in the United States District Court. He warned, however, that the form used for informal settlements, form 870-AD, although generally unenforceable, had been held by some courts to estop taxpayers from challenging the allocation of taxes. The doctors said they felt compelled to sign the agreement to avoid greater liability and publicity.

* * *

In late August 1991, Dr. and Mrs. Largen and Dr. and Mrs. Clontz both filed a 1040X amended personal income tax return for the years to which the informal settlement applied. Largen & Clontz filed a 1120X amended corporate income tax return for the disputed years. The IRS disallowed the claimed changes because none of the agreed grounds for reopening the issues settled by the 870-AD settlement was presented. On May 6, 1993, Plaintiffs filed this action for the IRS's denial of the amended tax computations. Although the filing was timely, the three year statute of limitations upon the original taxes has lapsed. Defendant seeks pre-trial resolution of only those claims asserted by Dr. and Mrs. Clontz.

* * *

To maintain an action, Plaintiffs must set forth and detail the basis upon which they believe they are due a refund—that the deductions and investment tax credits were based upon a reasonable belief that a profit could be realized over the term of the leases upon the tapes. Plaintiffs may face the a daunting task in showing that they were unduly influenced to enter into the settlement agreement as an essential element of their case, but no law or regulation commands them to disclose the grounds upon which they intend to rebut the validity of the agreement in order to maintain an action in this Court.

* * *

Although an informal tax settlement agreement is not enforceable under law, however, the parties to the agreement may be estopped from denying its enforcement in equity. The Botany Mills Court refused to address the question of whether estoppel could bind the parties to a settlement agreement, but the Supreme Court later found that estoppel may arise from an informal tax agreement. *Botany Mills*, 278 U.S. at 289; *R.H. Stearns Co. v. United States*, 291 U.S. 54, 61-62 (1934). In determining whether a taxpayer should be estopped from challenging an informal settlement, courts have relied upon general equitable principles regarding estoppel. To estop a taxpayer from claiming that an informal settlement agreement is not binding, the Government must show:

1. the taxpayer engaged in a false representation or wrongful misleading silence;

their choice was difficult and painful, it is far from unique. All parties to potential litigation, when offered a settlement, must weigh the odds of prevailing upon a claim and potential gains against possible liabilities. The choice is never easy, but it is not unfair or inequitable. If a settlement agreement is so one-sided as to be unacceptable to one of the parties, that party need only make a more palatable counteroffer and reject the original offer. That is seemingly what occurred in this case. Plaintiffs and Defendant negotiated until they reached a resolution to which all could agree. That Plaintiffs wish the settlement were more favorable does not render it inequitable, for a party scarcely gets all that it desires. Defendant therefore does not have unclean hands by dint of negotiating with Plaintiffs until they reached a settlement agreement that forced them to make difficult emotional and economic choices.”

In *Avers v. C.I.R.*, T.C. Memo 1988-176, 55 T.C.M. 678, the Tax Court held that the Service did not violate the taxpayer’s constitutional rights of equal protection by refusing to offer the same deal to that taxpayer in a partnership investment as had been offered to other investors in similar or identical partnerships in prior years.¹⁴⁰

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2. the error originated in a statement of fact, not in opinion or statement of law;
 3. the Government, in claiming the benefit of estoppel, did not know the true facts;
 4. the Government is adversely affected by the acts or statements of the taxpayer against whom estoppel is claimed.

Lignos v. United States, 439 F.2d 1365, 1368 (2d Cir.1971); *Stair*, 516 F.2d at 564.

Courts have differed, however, over what could be considered a sufficient showing of misrepresentation or misleading silence. Some have required only that the taxpayer entered into an informal settlement then permitted the statute of limitations to run to find misleading silence. Those courts have inferred that the taxpayer’s failure to repudiate the settlement before the running of the statute of limitations was intended to lull the Government into inaction.

* * *

However, Plaintiffs contend that Defendant should not be able to invoke the equitable powers of the Court to remedy the legal deficiencies of the settlement agreement, even if precedent supports its position. Plaintiffs allege that Defendant acted with unclean hands in reaching the 870-AD settlement agreement and therefore may not ask the Court to intercede equitably. They claim that Special Agent Hawkins’s statements and actions, the convening of a grand jury, and the alleged production of grand jury materials to the IRS Civil Audit division were unfair and illegal. Plaintiffs therefore contend that Defendant should not be permitted to implore the Court to estop Plaintiffs from repudiating the settlement agreement. * * * Plaintiffs first allege that they were forced into signing the settlement agreement by emotional and economic coercion. They contend they were forced into the Hobbesian choice between potentially enormous civil fraud penalties and foregoing their right to have their tax claims heard before the Court. If they refused to settle and appealed the IRS’s denial of deductions to the Court, they would expose themselves to both negative publicity and possible bankruptcy. However, by entering into the settlement, they would likely lose their right to appeal the denial of the deductions, which they believed were properly taken. Plaintiffs were forced to choose between a certain sum forfeited to the IRS and their reputations and, potentially, millions of dollars.

¹⁴⁰ As the court stated:

In both *Larkin* and *Avers*, the IRS won although their tactics were less than admirable. The question therefore is whether “professionalism” requires something more than the absolute minimum the law allows, something more than the absolute minimum the law permits. Does “professionalism” mean something other than winning at all costs?

19. Conflict of Law Issues: Multi-jurisdictional Practice

There is no single, nationally-recognized non-litigation ethical rule that applies to all lawyers. Given the lack of a single, uniform set of Bar rules on ethical obligations, which law a court later applies may have a huge impact on a lawyer's potential liability for alleged unethical conduct. If a lawyer is licensed in State A, negotiates a deal with a lawyer in State B, involving a corporation located in State C and incorporated in State D, involving a transaction that occurs in State E, then there are potentially five different state ethical rules that might or might not apply. It is beyond the scope of this paper to deal with an analysis of this area, but attorneys engaged in multi-state transactions must proceed cautiously, for it is possible that a court in one state may find a higher standard of

Next, petitioners maintain that respondent's failure to extend the identical settlement offer to all Koala investors violated the equal protection component of the Fifth Amendment due process clause. The Detroit Appeals Office arrived at a settlement position allowing Koala investors to deduct 60 percent of their out-of-pocket expenses (cash investment) made in 1981: This position was a departure from the previously existing policy of allowing a 100 percent deduction of initial investments made in tax shelters during taxable years prior to 1981. Before the new policy was fully implemented nationwide, various 1981 Koala investors received and accepted settlement offers of the 100 percent out-of-pocket deductions. Petitioners, therefore, insist that they are also entitled to the 100-percent deduction for 1981. We disagree. * * *

We reject petitioners' contention that they should be extended the same settlement offer as was extended to those who invested in Koala during 1979 and 1980. The mere offer of a particular settlement in a previous year does not require respondent to offer the same proposal in a later year. It is well settled that each tax year is independent from any other, and the Commissioner may challenge in a succeeding year that which he condoned or agreed to in a former year. *Harrah's Club v. United States*, 661 F.2d 203, 205 (Ct. Cl. 1981), and cases cited therein.

In order to prevail on their allegation regarding the 1981 settlement proposal, petitioners must demonstrate that others similarly situated have been extended a more favorable settlement offer for 1981, based on the same circumstances, and that respondent's discriminatory selection was based on impermissible considerations or an arbitrary classification. *Oyler v. Boles*, 368 U.S. 448 (1962); *Penn-Field Industries, Inc. v. Commissioner*, 74 T.C. 720, 723 (1980), and cases cited therein.

Petitioners have failed to demonstrate that there was any selectivity on the part of respondent in extending better settlement offers to others. His settlement offers were not dictated by law, but rather by efforts to reach amicable settlements of a large number of cases efficiently.

Respondent does not have to demonstrate that his settlement offers were fair. Petitioners could reject them if they were not. (Emphasis supplied)

care than the Bar of the state in which the attorney is licensed.¹⁴¹ Further, a lawyer has a duty not to handle matters for which he or she is not qualified; handling matters that are controlled by the substantive laws of another state should at least give an attorney some concern.

It is beyond the scope of this paper to deal with the conflict of law issues,¹⁴² but attorneys who are concerned about this matter may wish to look at the Louisiana Bar Association's and the ABA's Multijurisdictional Practice Rule 5.5. The Rule differentiates between the "temporary" practice of law in another jurisdiction, which is generally allowed under the following circumstances:

- a. You associate a local lawyer (the co-counsel situation).
- b. The matter is "reasonably related" to a "pending or potential proceeding." This applies, however, only in a tribunal setting. If there is no case upcoming but merely negotiations, there is no safe harbor.
- c. There is a mediation, arbitration, or ADR going on in another jurisdiction where you are admitted as a matter of right to handle the ADR (and not *pro hac*).
- d. The matter is "reasonably related" to your practice in your own jurisdiction. This allows for meetings out of state with witnesses or parties to a transaction *if* the matter is being handled in your own state. It also allows for multiple or recurring legal matters in multiple jurisdictions if the client has an interest in having a single lawyer represent it in all these matters, or if the lawyer has developed a specialty expertise, such as in federal labor law or appellate law. This may become an important "safe harbor" for many appellate attorneys.
- e. Are services provided to the "lawyer's employer" – this protects in-house counsel in non-tribunal matters.
- f. Or "are services that the lawyer is authorized to provide by federal law."

¹⁴¹ For example, in *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 124 F.R.D. 120 (W.D. La. 1989), affirmed and remanded, 894 F.2d 696 (5th Cir. 1990), a Massachusetts lawyer was sanctioned by a federal judge in Louisiana under the court's "inherent powers." In considering possible reciprocal discipline, the Massachusetts Supreme Court dismissed the complaint after a complete review of the record, finding "no support" for the charges or the sanctions. *In the Matter of McCabe*, 411 Mass. 436, 583 N.E. 2d 233 (Mass. 1991).

¹⁴² For cases on multijurisdictional practice issues, see: *Birbrower, Montalbano, Condon & Frank, P.C., et al. v. The Superior Court of Santa Clara*, 949 P.2d 1 (Calif. S.Ct. 1998), and *Fought & Company, Inc. v. Steel Engineering and Erection, Inc.*, 91 P.2d 487 (Hawaii S.Ct. 1998).

What is prohibited is everything else, including the “systematic and continuous” presence in a jurisdiction, although these terms are not defined.

Also, it should be noted that lawyers who advise their clients about the laws where the lawyer is not licensed to practice do so at their peril. See *Sample v. Morgan*, 935 A.2d 1046 (Del. Ch., Nov. 27, 2007) (footnotes omitted):

The question presented is a straightforward one. May a corporate lawyer and his law firm be sued in Delaware as to claims arising out of their actions in providing advice and services to a Delaware public corporation, its directors, and its managers regarding matters of Delaware corporate law when the lawyer and law firm: i) prepared and delivered to Delaware for filing a certificate amendment under challenge in the lawsuit; ii) advertise themselves as being able to provide coast-to-coast legal services and as experts in matters of corporate governance; iii) provided legal advice on a range of Delaware law matters at issue in the lawsuit; iv) undertook to direct the defense of the lawsuit; and v) face well-pled allegations of having aided and abetted the top managers of the corporation in breaching their fiduciary duties by entrenching and enriching themselves at the expense of the corporation and its public stockholders? The answer is yes.

* * *

As sophisticated practitioners of corporate law, the [law firm] defendants realize that Delaware, as a chartering state, has an important interest in regulating the internal affairs of its corporations, in order to ensure that the directors and officers of Delaware corporations honor their obligations to operate the corporation lawfully and in the best interest of the corporation's stockholders. The United States Supreme Court has long recognized the legitimacy and importance of a state's interest in regulating the internal affairs of its corporations. It can also be no surprise to the moving defendants that this important interest is given life in our state by providing stockholders with access to Delaware's court system in order to assert claims of breach of fiduciary duty; after all, decisions too numerous to cite make this clear.

Given these realities, it is difficult to conceive how it would shock the conscience to require the moving defendants to defend a lawsuit in Delaware. As is clear, the moving defendants purported to provide a wide range of advice and services to the board and officers of a Delaware corporation about important issues of Delaware law. That advice and assistance included the conception, preparation, and filing of the Certificate Amendment, which culminated in a filing in Delaware. Indeed, it is difficult to find a part of the scheme attacked

by the plaintiff that did not involve substantial participation by the moving defendants.

As a more general matter, the moving defendants are poorly positioned to claim a violation of Due Process. Given its own self-proclaimed national reach, [the non-Delaware law firm] is in a graceless position to claim to be constitutionally aggrieved by an exercise of jurisdiction by this court over it in a case where the claims against it entirely rest on its actions in providing Delaware law advice to a Delaware corporation. That is especially so when [the non-Delaware law firm] has taken the role of quarterbacking the defense of this action by drafting pleadings and briefs filed by other lawyers with this court, directing the defendants' (inadequate, incomplete, and untimely) responses to discovery, and even drafting the briefs in support of this motion.

20. Can You Withdraw if Your Client Refuses to do what You Suggest, and How Should You Withdraw – The “Silent” v. “Noisy” Withdrawal.

Once you have figured out what rule applies and that you are in fact at risk, what are you to do? E2K Model Rule 1.16 (“Declining or Terminating Representation”) suggests that one remedy for a lawyer is withdrawal, and the comments to E2K Model Rule 1.6 (“Confidentiality of Information”) indicate that the withdrawal can be “noisy”: *i.e.*, that you can signal to the opposing side something more than the mere fact of withdrawal by some indication that puts the opposing side on notice to investigate further, such as a disavowal of work product.¹⁴³ ABA Formal Opinion 92-366 attempted to illustrate the problem and provide a solution, but the ABA Committee’s split 5-3 vote on the resolution did little to provide reassurance that the rules are clear.¹⁴⁴

¹⁴³ For discussions of “noisy withdrawals,” *see*: C.R. Bowles, Jr., “Noisy Withdrawals: Urban Bankruptcy Legend or Invaluable Ethical Tool?” 20 Oct. Am. Bankr. Inst. J. 26 (2001); Daniel Pope and Helen Whatley Pope, “Ethics and Professionalism: Rule 1.6 and the Noisy Withdrawal,” 63 Def. Couns. J. 543 (1996); Michael R. Klein and Alan J. Otsfield, “Noisy Withdrawal,” 868 PLI/Corp. 529, Practising Law Institute Corporate Law and Practice Handbook Series, 26th Annual Institute on Securities Regulation, Nov. 1994.

¹⁴⁴ Pope and Pope, *supra*, 63 Def. Counsel J. 543 at 544, contains this description:

“[The opinion concerned a hypothetical involving] a bank loan to a lawyer’s client, which was based, in part, on an opinion letter given by the lawyer to the bank. The opinion letter was based on factual representations made by the president of the client to the lawyer. The president later confessed to his lawyer that his representations were false—and intentionally so. The president fired the lawyer, telling him in the process he intended to continue the fraud against the bank, he intended to conceal the misrepresentations from new counsel, and he intended to expand his company’s loan with the bank.

In a 5-to-3 opinion, the committee held:

1. Under Rule 1.6, the lawyer is prohibited from disclosing the client’s prior fraud or the client’s intent to perpetuate a future fraud to anybody-- not the bank, not the

What is one to do if you want to make a noisy withdrawal and whom do you tell? Assuming that you won't get into trouble with the client (who may sue you for breaching a confidence), and assuming that you've got to say something, what do you say?

E2K Model Rule 1.16 allows an attorney to withdraw if it can be accomplished without "material adverse effect on the interests of the client."¹⁴⁵ A noisy withdrawal, however, is clearly designed to alert somebody that something is afoot, so it can be anticipated that there will be an adverse effect on the client.

E2K Model Rule 1.16, however, also allows a withdrawal if the client is persisting "in a course of action involving the lawyer's services that the lawyer has reason to believe is criminal or fraudulent"¹⁴⁶ or if "the client has used the lawyer's services to perpetrate a crime or fraud"¹⁴⁷ or the client insists upon "taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement,"¹⁴⁸ or when "other good cause of withdrawal exists."¹⁴⁹ It is important to note, however, that the withdrawal under E2K Model Rule 1.16 is never mandatory; it is always discretionary.

Even E2K, however, does not help much in what you may say. While on the one hand it indicates, in *comments* only, that you may "withdraw or disaffirm any opinion, document, affirmation, or the like,"¹⁵⁰ nothing in the black letter law permits this in the context of fraud

client, not client's owners, not successor counsel.

2. Under Rules 1.2(d) and 1.16(a)(1), the lawyer must withdraw from any representation of the client.

3. Because in this case the mere withdrawal from the representation will not put the bank on notice that something is wrong, the lawyer also must advise the bank that the lawyer's previous opinion is withdrawn in order to comply with Rule 1.2(d).

4. The client's preemptive firing of its lawyer did not eliminate the lawyer's "noisy withdrawal" option under the comment to Rule 1.6.

5. But, if the client does not intend any future fraud, the lawyer cannot make a noisy withdrawal, cannot withdraw the opinion, or otherwise alert anyone to the previous fraud because of Rule 1.6.

¹⁴⁵ E2K Model Rule 1.16(b)(1).

¹⁴⁶ E2K Model Rule 1.16(b)(2).

¹⁴⁷ E2K Model Rule 1.16(b)(3).

¹⁴⁸ E2K Model Rule 1.16(b)(4).

¹⁴⁹ E2K Model Rule 1.16(b)(7).

¹⁵⁰ E2K Model Rule 1.6, Comment 14. This comment states:

"If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1). After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise permitted by Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice

or financial harm (remember, the proposal that would have permitted this was defeated by a 63% vote). Thus, while you can withdraw because of client fraud (E2K Model Rule 1.16), the Model Rules do not let you to reveal any confidential information (E2K Model Rule 1.6). Moreover, the comments, but not the black letter of E2K Model Rule 1.6, indicate that whether “other law” requires disclosure prohibited by E2K Model Rule 1.6 is “beyond the scope of these Rules.”¹⁵¹ This is not much help in determining whether judicial decisions that allow nonclients to sue for fraud, negligent misrepresentation, or silence are “law” that can trump the duty of confidentiality. For example, one “other law” may well be the Sarbanes-Oxley Act of 2002, and the SEC rules adopted in early 2003. The attitude of the SEC is reflected, in part, by the statements of its former Chairman, Harvey Pitt, who told the American Bar Association, “Lawyers for public companies represent the company as a whole and its shareholder-owners, not the managers who hire and fire them.”

Then, of course, there’s the not-so-slight problem of insurance coverage. Will your malpractice insurer cover you if:

your client sues you for revealing a confidence through a noisy withdrawal?

- a nonclient sues you for not engaging in a noisy withdrawal?

Thus, trying to do a noisy withdrawal in states that adopt the ABA E2K Model Rules intact may be as difficult as Odysseus’ task of steering between Scylla and Charybdis.¹⁵² No wonder that one commentator wrote, 16 years ago, the trouble with Rule 1.6 and the noisy withdrawal

of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).”

¹⁵¹ This language is found in E2K Model Rule 1.6, Comment 10, which reads:

“Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(4) permits the lawyer to make such disclosures as are necessary to comply with the law.”

¹⁵² As you recall, both were monsters of Greek legend between whom Odysseus had to steer in the Strait of Messina. Scylla, who ate several of Odysseus’ seaman, had “the face and breast of a woman, but from her flanks grew six dog-heads and twelve dog-feet,” and she had a serpentine tail. Charybdis, a daughter of Poseidon and Gaia, was turned into a monster by Zeus and lived in a cave opposite Scylla. This quotation is a translation of Apollodorus E7.20-21, as found at www.theoi.com/pontos/skylla.html.

comment “is that some fools may not understand that Rule 1.6 does not mean what it seems to mean.”¹⁵³

21. Conclusion

We should not deceive ourselves into believing that we are “ethical” lawyers because we have not directly violated the Model Rule or even some version of a state’s ethical code of “code of professionalism” or “code of civility.” We should not be surprised when the public looks askance at lawyers and questions their ethics when the core Rules permit misdirection, bluffing, and even lying (on all “non-material” issues) in furtherance of the client’s interest. We should not be shocked if courts find ways to impose liability on lawyers to those who are not their clients, even if there is extensive limitation language in opinion letters or even in the absence of any written opinion to the third party.

There is an inherent tension between the duty to represent a client and the duty to the profession. There is a practical tension in wanting to get the best deal possible for your side and the duty of ethical fair dealing. There is a discernable difference between conduct that is permitted outside of litigation as compared to conduct that can be sanctioned for lawyers during litigation. The fact that the ABA (and therefore Louisiana) has failed to adopt the same rules for non-litigation and litigation negotiations does not mean that the rules may not change in the future.

It can be anticipated that losing parties may bring lawsuits concerning lawyers’ roles in negotiations, and we should not be surprised if a set of rules emerges jurisprudentially. Likewise, we should not be surprised if these court-developed rules reflect the higher standards imposed upon litigation-related conduct, whether or not the negotiations occurred before or after a suit was filed.

We should strive to equate professionalism *with* ethics; the entire goal of law as an honorable profession is to have a higher standard than exists in the marketplace. Two quotes illustrate this proposition. The first is from a case from Michigan:

Opposing counsel does not have to deal with his adversary as he would deal in the marketplace. Standards of ethics require greater honesty, greater candor, and greater disclosure, even though it might not be in the interest of the client or his estate. 571 F.Supp. 507, 512.¹⁵⁴

¹⁵³ Geoffrey C. Hazard Jr., “Rectification of Client Fraud: Death and Revival of a Professional Norm,” 33 Emory L.J. 271, 306 (1984), quoted by Pope and Pope, *supra*, 63 Def. Counsel J. at 543.

¹⁵⁴ *Virzi v. Grand Trunk Warehouse and Cold Storage Co.*, 571 F.Supp. 507 (E.D. Michigan 1983). See also, *Spaulding v. Zimmerman*, 263 Minn. 346, 116 N.W.2d 704 (1962); *Newman v. Fjelstad*, 271 Minn. 514, 137 N.W.2d 181 (1965); *Simons v. Shiek’s, Inc.*, 275 Minn. 132, 145 N.W.2d 548 (1966); *Toledo Bar Ass’n v. Fell*, 51 Ohio St. 2d 33, 364 N.E.2d 872 (1977).

The other is from a seminal article on legal ethics by a Louisiana-trained lawyer and judge:

If he is a professional and not merely a hired, albeit skilled hand, the lawyer is not free to do anything his client might do in the same circumstances. The corollary of that proposition does set a minimum standard: the lawyer must be at least as candid and honest as his client would be required to be. The agent of the client, that is, his attorney-at-law, must not perpetrate the kind of fraud or deception that would vitiate a bargain if practiced by his principal. Beyond that, the profession should embrace an affirmative ethical standard for attorneys' professional relationships with courts, other lawyers and the public: *The lawyer must act honestly and in good faith*. Another lawyer, or a layman, who deals with a lawyer should not need to exercise the same degree of caution that he would if trading for reputedly antique copper jugs in an oriental bazaar. It is inherent in the concept of an ethic, as a principle of good conduct, that it is morally binding on the conscience of the professional, and not merely a rule of the game adopted because other players observe (or fail to adopt) the same rule. Good conduct exacts more than mere convenience. It is not sufficient to call on personal self-interest; this is the standard created by the thesis that the same adversary met today may be faced again tomorrow, and one had best not prejudice that future engagement.¹⁵⁵

Lawyers should stand apart not merely by their training but by their behavior and the mutual philosophical principles to which they hold one another. It is submitted that one day we will look back upon the current trend of distinguishing "ethics" and "professionalism" as perhaps misguided and counterproductive. To say that the Model Rules are "ethics" is to denigrate ethics, and to distinguish "ethics" from "professionalism" is to confuse both.

We should strive for the day when all who bear the title of "lawyer" are seen as ethical professionals.

One may not agree with those who contend that the ethical basis of negotiations (or any extra-tribunal actions) should be one of truth and fair dealing, that as professionals lawyers should "not accept a result that is unconscionably unfair to the other party."¹⁵⁶ Yet, it would be hard to argue with a more practical formulation, given the serious possibility that a single standard will ultimately evolve jurisprudentially:

If you wouldn't do something in a courtroom context, if you wouldn't make a misleading statement in a settlement conference

¹⁵⁵ Judge Alvin B. Rubin, writing in 35 La.L.Rev. 577 at 589 (1975), *A Causerie on Lawyers' Ethics in Negotiation*.

¹⁵⁶ Judge Alvin B. Rubin, *A Causerie on Lawyer's Ethics in Negotiation*, 35 Louisiana Law Rev. at pg. 591 (1975).

with a judge, and if you wouldn't remain silent about a misstatement made by your client or partner during discussions in court chambers or in open court, then you shouldn't do any of these things in non-litigation negotiations of any kind.

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